DOCKET

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Title: Barbara Finley, Petitioner
v.
United States

Docketed:
June 2, 1988

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Cook,Joseph T.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jun 2 1988	G	Petition for writ of certiorari filed.
3	Jun 23 1988		Order extending time to file response to petition until July 19, 1988.
5	Jul 19 1988	X	Brief of respondent United States (TBP) in opposition filed.
6	Jul 19 1988	X	Brief of respondent filed.
4	Jul 20 1988		DISTRIBUTED. September 26, 1988
7	Oct 3 1988		Petition GRANTED.
			**********
8	Nov 15 1988		Record filed.
		*	Certified copy of original record, 1 volume, received.
9	Nov 17 1988		Joint appendix filed.
10	Nov 17 1988		Brief of petitioner Barbara Finley filed.
11	Nov 22 1988		Record filed.
		*	Certified copy of original record received.
13	Dec 21 1988		Order extending time to file brief of respondent on the merits until January 4, 1989.
14	Jan 4 1989		Brief of respondent United States filed.
16	Jan 6 1989		SET FOR ARGUMENT TUESDAY, FEBRUARY 28, 1989. (4TH CASE.)
15	Jan 12 1989		CIRCULATED.
17	Feb 2 1989	X	Reply brief of petitioner Barbara Finley filed.
18	Feb 28 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

87-1973

No.

Supreme Court, U.S.
FILED
JUN 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BARBARA FINLEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is error for the circuit court of appeals to reverse and dismiss pendent parties for lack of jurisdiction, in a case which includes exclusive federal jurisdiction over the United States as defendant, after a district court has exercised discretion and invoked pendent-party jurisdiction over parties not subject to independent federal jurisdiction.

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No. _____

IN THE

Supreme Court of the United States

October Term, 1987

BARBARA FINLEY,
Petitioner,
vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner's claim in this Court relates to the propriety of the entry of an Order on April 16, 1987 by the United States District Court for the Southern District of California permitting plaintiff to amend her complaint to add defendants by asserting pendent-party jurisdiction (App. A, *infra*, pp. A-5 to A-10). The Court of Appeals for the Ninth Circuit granted an interlocutory appeal (App. A, *infra*, p. A-3), and reversed the District Court's decision (App. A, *infra*, p. A-1).

JURISDICTION

Contained within the order allowing for amendment of the complaint was a certification by the district court that the jurisdictional decision was appropriate for the grant of an interlocutory appeal pursuant to the provisions of 28

U.S.C. section 1292(b) (App. A, *infra*, pp. A-9,10). The defendant below, United States, timely petitioned the Ninth Circuit Court of Appeals for permission to take the interlocutory appeal. The Ninth Circuit Court of Appeals granted permission to appeal under 28 U.S.C. section 1292(b) (App. A, *infra*, p. A-3). On March 4, 1988, the Ninth Circuit Court of Appeals reversed the District Court's decision. (App. A, *infra*, p. A-1). By that order, the Court of Appeals also denied a petition for hearing en banc which had been filed with appellee's brief. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

PROVISIONS OF LAW INVOLVED

The issue presented involves non-statutory federal jurisdiction, but the Federal Tort Claims Act, 28 U.S.C. sections 1346(b) and 2671-2680, is involved.

STATEMENT OF CASE

This is a simple tort case. Plaintiff's decedents were killed in an airplane accident and plaintiff seeks recovery for their wrongful deaths. As is typical in an airplane accident case, the plaintiff has alleged that a number of factors combined to cause the crash, and that several defendants are jointly and severally liable. Plaintiff sued the United States Government alleging negligent operation of runway lighting and negligent air traffic control; the City of San Diego Department of Airports alleging negligent operation of runway lighting; and the San Diego Gas & Electric Company alleging negligent placement of and failure to adequately mark electric transmission lines.

There is no independent basis for federal jurisdiction with respect to San Diego Gas & Electric and the City of San

Diego. No federal question is presented, and the parties are not diverse. With respect to defendant United States of America, plaintiff must seek her remedy under the Federal Tort Claims Act exclusively in federal court. 28 U.S.C. section 1346(b).

Plaintiff sued the United States in federal court pursuant to the Federal Tort Claims Act, 28 U.S.C. sections 1346(b) and 2671-2680. She then filed a motion to amend her complaint in order to add San Diego Gas & Electric Company and the City of San Diego.[1] The proposed amended complaint, attached to the motion, invoked pendent-party jurisdiction with respect to the newly added parties. The United States of America opposed the motion to amend, citing *Ayala v. United States*, 550 F.2d 1196 (9th Cir. 1977), *cert. granted*, 434 U.S. 814 (1977), *cert. dismissed*, 435 U.S. 982 (1978).[2]

Notwithstanding *Ayala*, the district court exercised its discretion and held that the litigation arose from a common nucleus of operative facts and that judicial economy, efficiency and fairness mandated that the case be resolved in one forum. Further, the court observed that the only available single forum was the United States District Court. The district court granted plaintiff's motion to amend,

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[1] The City of San Diego and San Diego Gas & Electric Company had previously been sued in state court. That action was dismissed by stipulation and without prejudice in order to maintain the entire action in federal court. *Finley v. San Diego Gas & Electric, et al.*, California Superior Court, County of San Diego, Case No. 528516.

[2] The parties that petitioner seeks to add through pendent-party jurisdiction agree that a single trial in the federal forum would be best for all concerned. Neither oppose the exercise of pendent-party jurisdiction over them. Both have asserted indemnity claims against the United States in federal court. *City of San Diego v. USA*, Civil No. 87-187-S (SD CA) and *San Diego Gas & Electric Company v. USA*, Civil No. 86-2017-S (SD CA)

accepted pendent-party jurisdiction, and certified the question to the Ninth Circuit Court of Appeal. (App. A, *infra*, pp. A-9,10). The Ninth Circuit summarily reversed without discussing the district court's analysis of the factors enumerated in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), and *Aldinger v. Howard*, 427 U.S. 1 (1976). (App. A, *infra*, p. A-3). Plaintiff now petitions this Court for a Writ of Certiorari to review the appellate court's opinion.

ARGUMENT

I.

CERTIORARI SHOULD BE GRANTED TO UNIFY THE APPLICATION OF PENDENT-PARTY JURISDICTION THROUGHOUT THE CIRCUITS

Pendent-Claim Jurisdiction

The doctrine of pendent jurisdiction allows a federal court which has jurisdiction of one or more of plaintiff's claims to take jurisdiction of another of the plaintiff's claims although there is no independent basis of federal jurisdiction over the latter. As stated by this court in *United Mine Workers v. Gibbs*:

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the laws of the United States, and treaties made or which shall be made, under their authority . . .," U.S. Const., Art. III, Section 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." (Emphasis in original)

Gibbs, 383 U.S. at 725.

In the process of recognizing pendent-claim jurisdiction, the *Gibbs* court formulated criteria for district courts to consider in exercising jurisdiction over non-federal claims when the parties involved were already properly before the court on related federal claims. The factors bearing on a district court's discretionary decision to exercise pendent-claim jurisdiction are as follows:

a. The initial federal claim arose under the Constitution, laws or treaties of the United States;

b. The relationship between the federal and state claims permit the conclusion that the two actions constitute "one case";

c. The federal claim confers subject matter jurisdiction in the court;

d. The state and federal claims derive from a common nucleus of operative facts such that, if considered without regard to their federal or state character, they would ordinarily be expected to be tried in one judicial proceeding. *Id.*, at 725.

To the extent that a federal district court determines that pendent claims meet the above criteria, the federal court has the *power* to hear the claim pursuant to the authority of Article III of the Constitution absent specific congressional language to the contrary. *Id.*, at 725.

One rationale for pendent-claim jurisdiction is judicial efficiency and economy. It makes no sense to require parties before a federal court on one claim to go to the extra effort and expense to hike down the block to the state courthouse to litigate a related claim arising from the same set of "operative facts." Another rationale is founded on the need to protect litigants against the possibility of inconsistent and irreconcilable verdicts. Clearly, claims that arise together should be tried together.

Pendent-Party Jurisdiction

The exercise of federal jurisdiction over parties otherwise not subject to federal jurisdiction is, under the proper circumstances, a logical outgrowth of pendent-claim jurisdiction. Indeed, the concept of "pendent-party" jurisdiction has been supported by this Court in *Aldinger v. Howard*, 427 U.S. 1 (1976). The *Aldinger* case, on appeal from the Ninth Circuit Court of Appeals, involved a federal civil rights claim under 42 U.S.C. section 1983 against various county officials, and additional state law claims against a county over which federal jurisdiction did not exist due to congressional mandate. Because 42 U.S.C. section 1983 excluded municipal corporations such as counties from its reach, the Ninth Circuit's refusal to accept pendent-party jurisdiction was upheld. However, writing for the court, then-Associate Justice Rehnquist suggested:

> When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. §1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only* in a federal court may all of the claims be tried together. (Emphasis in original)

Id., at 18.

Despite this clear indication of approval of pendent-party jurisdiction in cases such as the one at bar, the Ninth Circuit subsequently held that Federal Tort Claims Act jurisdiction was *not* sufficient to justify or permit pendent-party jurisdiction. *Ayala*, 550 F.2d at 1200. Although a minor shift in the Ninth Circuit's position might be seen in *Mattschei v. United States*, 600 F.2d 205, 207 n.2 (9th Cir. 1979),[3] more recent cases decided by the circuit have uniformly opposed pendent-party jurisdiction of any kind. *Safeco Ins. Co. of America v. Guyton*, 692 F.2d 551 (9th Cir. 1982); *Carpenters Southern California Administrative Corp. v. D&L Camp Construction Co., Inc.*, 738 F.2d 999 (9th Cir. 1984); *Munoz v. Small Business Administration*, 644 F.2d 1361 (9th Cir. 1981).

The Ninth Circuit Stands Alone

The Ninth Circuit's hostility to pendent-party jurisdiction is solitary. District court judges in that circuit alone are precluded from exercising their discretion to apply pendent-party jurisdiction because the circuit maintains that the court lacks Article III power to exercise jurisdiction over any matter that is not supported by independent federal jurisdiction.

All other circuits have decided cases more in line with *Gibbs* and *Aldinger*. A litigant's right to litigate claims arising from a single incident, such as the airplane accident here, in one court against multiple defendants including the United States, ought not be precluded merely because the action must be filed in California and therefore within the Ninth Circuit. Such is not the law of this Court, and the Ninth Circuit should be so advised.

In cases in which the Federal Tort Claims Act has required exclusive federal jurisdiction against the United

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[3] In the *Mattschei* case, an airplane accident produced federal litigation against the United States and state court litigation against non-diverse defendants. On appeal, the Ninth Circuit panel stated in Note 2, "although not argued by the parties, the district court's dismissal of plaintiff's pendent claim against [the pilot] is open to some question. [Citations omitted]"

States, three circuits, the First, Tenth and Eleventh[4], have exercised pendent-party jurisdiction over other parties that lacked an independent basis for federal jurisdiction. Two circuits, the Second and the Fifth[5], have exercised pendent-party jurisdiction where one of the defendants was before the court on the basis of some other exclusive federal grant.[6] The Seventh and Eighth Circuits[7] have approved the use of pendent-party jurisdiction where the "main claim" was before the court on a federal question. The Sixth, and D.C. Circuits[8] have acknowledged the propriety of the discretionary use of pendent-party jurisdiction in certain circumstances. The Third and Fourth Circuits[9] have not been called upon to decide a clear pendent-party case, but have acknowledged in dicta the force and effect of *Aldinger*.

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[4] *Ortiz v. United States*, 595 F.2d 65 (1st Cir. 1979); *Stewart v. United States*, 716 F.2d 755 (10th Cir. 1982); *Brown v. United States*, 838 F.2d 1157 (11th Cir. 1988).

[5] *Weinberger v. Kendrick*, 698 F.2d 61 (2nd Cir. 1982), *cert. denied*, 464 U.S. 818 (1983); *Smith v. National Flood Insurance Program*, 796 F.2d 90 (5th Cir. 1986).

[6] Exclusive federal jurisdiction grants which provide an anchor to pendent-party jurisdiction included the Federal Tort Claims Act (applicable to the case at bar); the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), Rule 10b-5, (*Weinberger v. Kendrick*); The National Flood Insurance Program 42 U.S.C. §4072, (*Smith v. National Flood*); and, the Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1602. This list is not exhaustive.

[7] *Price v. Pierce*, 823 F.2d 1114 (7th Cir. 1987); *State of North Dakota v. Merchant's National Bank & Trust Company*, 634 F.2d 368 (8th Cir. 1980).

[8] *Koppers Company, Inc. v. Garling & Langlois*, 594 F.2d 1094 (6th Cir. 1979) n.1; *Long v. District of Columbia*, 820 F.2d 409 (D.C. Cir. 1987).

[9] *Kerry Coal Co. v. United Mine Workers*, 637 F.2d 957, 965 (3rd Cir. 1981), *cert. denied*, 454 U.S. 823 (1981); *Johnson v. Town of Elizabethtown*, 800 F.2d 404, 407-08 (4th Cir. 1986).

II.

LOGIC, JUDICIAL ECONOMY, JUSTICE AND FAIRNESS MANDATE THE DISCRETIONARY EXERCISE OF PENDENT-PARTY JURISDICTION

In cases, such as the case at bar, where subject matter jurisdiction with regard to one or more of the parties is exclusively federal, the position of the Ninth Circuit defies reason. Even putting aside the overwhelming disagreement asserted by the other circuits, *supra*, the *Ayala* decision and its progeny cannot be logically defended.

Petitioner does not ask this Court for an all encompassing mandate which sets forth every circumstance, term, and condition under which pendent-party jurisdiction must be recognized. Rather, all petitioner seeks is further amplification of the previously established concept of pendent-party jurisdiction as it applies to cases where the grant of jurisdiction to a federal court is exclusive. In short, district court judges ought to have the discretion to accept pendent-party jurisdiction in cases where one of the party defendants is before the court on an exclusive federal grant of jurisdiction. Such an exercise of discretion ought not be overturned by the appellate court absent a clear abuse of discretion in the application of the factors discussed in *Gibbs*.

In the instant case, the trial court weighed various factors and determined that judicial economy, fairness to the litigants, and justice properly supported an exercise of pendent-party jurisdiction over the non-diverse parties. District courts are given broad discretion in evaluating these matters. *Moor v. County of Alameda*, 411 U.S. 693, 716 (1973), *reh'g denied*, 412 U.S. 963 (1973).

But here, despite the words of *Gibbs*, *Aldinger*, and *Moor*, the Ninth Circuit, relying on *Ayala*, removed all discretion by summarily reversing. No finding was made that the district court abused its discretion — indeed, the Ninth Circuit did not even address the factors considered in the district court's order. The Ninth Circuit has, in effect, stripped all district judges within that circuit of the discretion granted them by this court in *Moor*.

The Ninth Circuit Court of Appeal in the *Ayala* decision denies district courts the power under Article III of the Constitution to exercise any discretion with respect to pendent-party claims. That holding flies in the face of *Gibbs*. *Gibbs*, as amplified by *Aldinger*, is a recognition that Article III of the Constitution *does* provide federal courts with non-statutory jurisdiction when certain factors are met and absent contrary statutory language. In *Ayala*, the Ninth Circuit ignores the extension of *Gibbs* by *Aldinger* and begs to be instructed again. This Court, in *this* case, should grant that request.

CONCLUSION

This is a simple tort case. Defendants have been charged with overlapping acts of negligence which caused an airplane accident. Two of the defendants, the United States of America and the City of San Diego have been charged with negligent maintenance and operation of runway lights. In fairness to the litigants all of the claims should clearly be tried together. Inasmuch as the Federal Tort Claims Act precludes litigation against the United States anywhere but the federal court, it is clear that the entire case should be tried in federal court. Pendent-party jurisdiction is the vehicle which will permit that result, but the Ninth Circuit Court of Appeals disapproves. The Ninth Circuit Court of Appeals should be reversed, and the order of the district

court granting petitioner's motion for leave to amend to join pendent parties should be reinstated.

DATED: May 31, 1988

Respectfully submitted,

SPEISER, KRAUSE & MADOLE

By: JOSEPH T. COOK*
JUANITA M. MADOLE
JOHN J. VETH

Attorneys for Petitioner

**Counsel of Record*

APPENDIX A

No. 87-6091

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BARBARA FINLEY,
Plaintiff-Appellee,

vs.

FILED
MAR - 4 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

CITY OF SAN DIEGO, et al.,
Defendants,

and

UNITED STATES OF AMERICA,
Defendant-Appellant.

DC# CV-86-1151-S
Southern California

ORDER

Before: KOELSCH, REINHARDT and WIGGINS, Circuit Judges

On July 7, 1987, this court directed appellee to show cause why the district court's order should not be summarily reversed under *Ayala v. United States*, 550 F.2d 1196 (9th Cir. 1977). The court has considered appellee's response to the order to show cause, the response by San

Diego Gas & Electric, and appellant's reply to appellee's response. This matter is summarily reversed under *Ayala*.

MoCal 2/26/88
5

No. 87-8082

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BARBARA FINLEY,
Plaintiff-Respondent,

vs.

CITY OF SAN DIEGO, et al.,
Defendants,

and

UNITED STATES OF AMERICA,
Defendant-Petitioner.

FILED
JUL 7 1987
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

DC# CV-86-1151-EJS
Southern California

ORDER

Before: PREGERSON and ALARCON, Circuit Judges

The government's petition for permission to appeal under 28 U.S.C. § 1292(b) is granted. Petitioner shall comply with Fed. R. App. P. 5(d). Within 21 days from the filing of the notice of appeal, appellee shall show cause why the district court's order should not be summarily reversed under *Ayala v. United States*, 550 F.2d 1196 (9th Cir. 1977). Apellant

may file a reply within 14 days from service of appellee's memorandum.

MoCal 6/24/87

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

___ FILED
_X_ ENTERED
___ LODGED
___ RECEIVED

BARBARA FINLEY, individually, and as a Personal Representative of the Estates of ROBERT FINLEY, ROBIN FINLEY, RENEE FINLEY, and SCOTT FINLEY, deceased,
Plaintiff,

APRIL 16 1987
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

vs.

UNITED STATES OF AMERICA,
Defendant.

CIVIL ACTION NO. 86-1151-S(M)

PROPOSED ORDER

This matter came on before the Court for argument on March 30,1987 on the motion of the plaintiff to amend her complaint. In her original complaint, plaintiff named only the United States Government as a party defendant. Plaintiff's proposed amended complaint would add claims against the City of San Diego (City) and San Diego Gas & Electric Company (SDG&E). Neither the City of San Diego nor San Diego Gas & Electric Company is diverse in citizenship from the plaintiff, and there is no other applicable federal jurisdiction over those defendants.

Plaintiff's motion for leave to amend included a request for this Court to accept pendent party jurisdiction over the two additional defendants. For reasons set forth hereafter, the plaintiff's motion to amend and to request pendent party jurisdiction is granted.

BACKGROUND

This case arises from the crash of a privately owned and operated twin-engine Beechcraft aircraft on the night of November 11,1983. Plaintiff's decendents, her husband ROBERT FINLEY, and her two daughters ROBIN and RENEE FINLEY were passengers on the plane.

At approximately 10:21 in the evening of November 11,1983, the aircraft commenced an instrument approach to Montgomery Field near San Diego. The weather conditions were cloudy and rainy, and the pilot reported on the radio that he was not able to see the approach and the runway lights to effectuate a safe landing. At that point the pilot was authorized by FAA radar controllers with whom he was communicating to go around and attempt a second instrument approach to the same runway.

During the second attempt to land, at approximately 10:38 p.m., the plane struck electric transmission lines owned by SDG&E, slightly less than two miles from the touchdown point for the runway. As a result of hitting the electric transmission lines, the plane crashed into the ground, burst into flames and was destroyed by fire. All four occupants, including plaintiff's decedents, were killed in the resulting fire, or later succumbed to burn injuries.

Plaintiff initially filed suit in San Diego Superior Court (Civil Case No. 528516) against SDG&E and the City. Plaintiff alleged that SDG&E was negligent in the placement of the transmission lines and the failure to

provide warning lights on the poles that supported those lines, and that the City was negligent in the maintenance and operation of the runway approach lights which, it was alleged, were inoperative at the time of the crash. During discovery, City employees testified that the approach and runway lights were maintained and operated by the Federal Aviation Administration, an agency of the United States Government. Subsequently, FAA witnesses supported that position.

After receiving that testimony, plaintiff filed this Federal Tort Claims Act (28 U.S.C. 1346, 2674) action against the UNITED STATES OF AMERICA, asserting negligence in the operation and maintenance of the runway lights, and in the performance of air traffic control functions by the radar controller.

On January 22, 1987, the San Diego Superior Court, upon the motion of SDG&E and the City, entered a conditional dismissal of the state court action in anticipation and expectation of the entire matter being consolidated for trial in the federal court.

In addition to this action, both SDG&E and the City of San Diego have filed indemnity actions against the UNITED STATES,[1] seeking full or partial indemnity and/or contribution in the event that they are found liable.

PENDANT PARTY JURISDICTION IN THE NINTH CIRCUIT

The defendant the UNITED STATES OF AMERICA, vigorously opposing the plaintiff's motion, has invited the Court's attention to a series of Ninth Circuit cases which

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[1] *San Diego Gas & Electric Co. v. USA* Civil No. 86-2017-S(M); *City of San Diego v. USA* Civil No. 87-187-S(M).

refuse to approve the utilization of pendent party jurisdiction. *Ayala v. United States* 550 F.2d 1196 (9th Cir. 1977) cert. dismissed per stip. 435 U.S. 982 (1978); *Munoz v. Small Business Administrations* 644 F.2d 1361 (9th Cir. 1981); *Safeco Insurance Company v. Guyton* 692 F.2d 551 (9th Cir. 1982) and *Carpenter Southern California Administrative Corp. v. D.L. Camp Construction Company, Inc.* 738 F.2d 999 (9th Cir. 1984). Although only one of these cases, *Ayala v. United States*, involves the Federal Tort Claims Act as the "anchor" jurisdiction, this Court is no less troubled by the Circuit's clear antipathy toward pendent party jurisdiction.

Plaintiff urges in her moving papers that *Munoz*, *Safeco*, and *Carpenters* are not applicable to this case, because those are not cases in which an exclusive grant of jurisdiction, such as the Federal Tort Claims Act, is involved. Plaintiff goes on to attempt to distinguish *Ayala* on the facts and circumstances of the case, and to question the current validity of *Ayala* in light of dicta found in footnote 2 in *Matttschei v. United States* 600 F.2d 205, 207 (9th Cir. 1979).

DISCUSSION

It seems clear from the perspective of judicial economy and efficiency that all of these actions ought to be tried together. Quite clearly, they arise from a common nucleus of operative facts. *United Mine Workers v. Gibbs* 383 U.S. 715 (1966). Indeed, the claim against the City of San Diego and at least part of the claim against the UNITED STATES, that the approach lights were not functioning properly, are identical. No significant additional burden would be placed upon any party by having the entire matter tried in federal court, in one trial, and indeed all of the parties but for the UNITED STATES want to consolidate it

for a single trial. Were *Ayala* the last word from in this Circuit with repsect to FTCA/pendent party jurisdiction cases, this Court would reluctantly agree with the UNITED STATES. However, the *Mattschei* case appears to invite another look at the Ninth Circuit policy, at least in FTCA cases, and this Court will happily accept that invitation. *Mattschei* suggests, in footnote 2, that the denial of a pendent party claim in an FTCA case, such as here, might be wrong. This case, as was *Mattschei*, is a fairly simple case, with a small number of parties involved in a single accident. *Ayala* was much more complicated in terms of the numbers of parties involved and the types and qualities of claims made. Perhaps *Ayala*, because of its complexity, was not an appropriate case for pendent party jurisdiction. Perhaps *Mattschei*, and this case are.

For the foregoing reasons, this Court grants the plaintiff's motion to amend her complaint so as to add the City of San Diego and SDG&E as defendants, and accepts the invitation of plaintiff to assert pendent party jurisdiction over those two defendants.

INTERLOCUTORY APPEAL

It is clear from the foregoing discussion that this Court's decision is far from certain. In view of the fact that the make-up of the parties to the litigation will have a substantial effect on the strategy and tactics of the litigants, this decision clearly involves a "controlling question of law". The differences in opinion expressed by the plaintiff and by the defendant UNITED STATES, and indeed the uncertainty of this Court clearly suggests that an immediate appeal from this order will materially advance the ultimate termination of this litigation. Accordingly, this Court's decision and order is certified for interlocutory appeal pursuant to the provisions of 28 U.S.C. 1292(b).

ORDER

In accordance with the foregoing, IT IS HEREBY ORDERED:

1. That plaintiff's motion for leave to amend is GRANTED;

2. That pendent party jurisdiction over the City of San Diego and San Diego Gas & Electric Company is asserted, and,

3. The question is certified for immediate interlocutory appeal pursuant to 28 U.S.C. 1292(b).

SO ORDERED.

DATED: April 13, 1987

Edward J. Schwartz
United States District Judge

Submitted by:
JOSEPH T. COOK

Approved as to form:
/s/ Michael E. Quinton
Assistant United States Attorney

MA-460/PROP-ORD

OPPOSITION

BRIEF

(2)

No. 87-1973

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

BARBARA FINLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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20 pp

QUESTION PRESENTED

Whether, in an action brought against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, a district court may exercise "pendent party jurisdiction" over the plaintiff's claims against other persons, where there exists no independent basis for federal-court jurisdiction over the claims against those persons.

II

PARTIES TO THE PROCEEDING

Pursuant to the district court's order, which was reversed by the court of appeals, the City of San Diego and the San Diego Gas & Electric Company were added as defendants in this proceeding.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the district court (Pet. App. A5-A10) granting petitioner's motion to add the City of San Diego and the San Diego Gas & Electric Company as defendants in this action and certifying the question for interlocutory appeal is not reported. The order of the court of appeals (Pet. App. A3-A4) granting the government's petition for permission to take an interlocutory appeal and ordering the plaintiff to show cause why the district court's decision should not be summarily reversed is not reported. The order of the court of appeals (Pet. App. A1-A2) summarily reversing the district court's decision is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1988. The petition for a writ of certiorari was filed on June 2, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The jurisdictional provision of the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), provides in pertinent part:

> Subject to the provisions of [28 U.S.C. 2671-2680], the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT

1. Petitioner's husband and two daughters were killed in a plane crash at Montgomery Field, an airport near San Diego, California, in November 1983, after the plane carrying them struck electric power lines (Pet. App. A6). Petitioner filed suit in the California courts against the City of San Diego (the City) and the San Diego Gas & Electric Company (the Utility). She claimed (1) that the City had negligently failed to maintain and operate the runway approach lights, which allegedly were not working at the time of the crash, and (2) that the Utility had negligently placed the transmission lines near the runway and failed to place warning lights on the poles supporting the lines. *Id.* at A6-A7. After some discovery in the state-court suit, petitioner filed a federal-court action against the United States under the FTCA. She alleged that the

Federal Aviation Administration (FAA) was responsible for maintaining and operating the runway lights and that the FAA had been negligent in carrying out that responsibility. *Id.* at A7. She also alleged that FAA air-traffic-control personnel had been negligent in giving landing instructions to the plane's pilot (*ibid.*).

2. Petitioner subsequently sought to consolidate the two suits in federal court. She filed a motion in the FTCA action to amend her complaint to add new claims against new defendants—her tort claims under state law against the City and the Utility. With respect to those claims and parties, as petitioner acknowledges (Pet. 3), "[n]o federal question is presented, and the parties are not diverse." Lacking any independent basis for alleging federal-court jurisdiction over the claims against the City and Utility, petitioner asked the district court to accept jurisdiction over those claims and parties under the doctrine of "pendent-party jurisdiction." *Aldinger* v. *Howard*, 427 U.S. 1, 18 (1976).[1]

The district court granted petitioner's motion (Pet. App. A5-A10). The court reasoned (*id.* at A8) that "from the perspective of judicial economy and efficiency * * * all of these actions ought to be tried together." Borrowing from the leading decision on "pendent-claim" jurisdiction, *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), the

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[1] "Pendent party" jurisdiction is claimed where, as here, the plaintiff in an action in federal court seeks "the addition of a party which is implicated in the litigation only with respect to [a] pendent state law claim and not also with respect to any claim as to which there is an independent basis of federal jurisdiction." *Moor* v. *County of Alameda*, 411 U.S. 693, 713 (1973). See *Aldinger*, 427 U.S. at 6, 15. "Pendent claim" jurisdiction, by contrast, is claimed where a federal-court plaintiff seeks to include a state-law claim against defendants who are already in the suit by virtue of claims that give rise to federal jurisdiction. See *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

district court observed (Pet. App. A8) that the FTCA claim against the government and the state-law claims against the City and the Utility "arise from a common nucleus of operative facts."[2] The court added (*ibid.*) that, in its view, "[n]o significant additional burden would be placed upon any party by having the entire matter tried in federal court, in one trial." Accordingly, noting that "all of the parties but for the UNITED STATES want to consolidate [the matters] for a single trial" (*id.* at A8-A9), the court concluded that it would "accept[] the invitation of plaintiff to assert pendent party jurisdiction over [the City and the Utility]" (*id.* at A9). The court recognized, however, that its ruling might be inconsistent with the Ninth Circuit decision in *Ayala* v. *United States,* 550 F.2d 1196 (9th Cir. 1977) (rejecting pendent-party jurisdiction in an FTCA case), cert. dismissed, 435 U.S. 982 (1978), and it therefore certified its ruling for interlocutory appeal under 28 U.S.C. (& Supp. IV) 1292(b). Pet. App. A9-A10.

3. As provided by 28 U.S.C. (& Supp. IV) 1292(b), the government petitioned the court of appeals to permit the interlocutory appeal. By order dated July 7, 1987, the court of appeals granted the government's petition and directed the plaintiff to "show cause why the district court's order should not be summarily reversed under *Ayala*." Pet. App. A3-A4. On March 4, 1988, the court of

[2] In *Gibbs,* this Court held that, when a plaintiff has brought suit on a claim arising under federal law, a district court has the power to exercise jurisdiction over state-law claims against the same defendants where the state- and federal-law claims arise out of a "common nucleus of operative fact" and the "plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding" (383 U.S. at 725). See *Carnegie-Mellon Univ.* v. *Cohill,* No. 86-1021 (Jan. 20, 1988), slip op. 5-6.

appeals summarily reversed the district court's decision (*id.* at A1-A2).[3]

DISCUSSION

This case squarely presents the question whether federal district courts may exercise pendent-party jurisdiction in actions brought against the United States under the Federal Tort Claims Act. The question is recurring, the courts of appeals have given different answers to it, and this Court has not addressed it. In *Ayala,* the Ninth Circuit decision on which the court of appeals relied in this case, this Court granted certiorari on the question, but certiorari was ultimately dismissed.[4] This case presents a suitable vehicle for the Court to address and to resolve the issue. Although, unlike petitioner, we think that the court of appeals correctly ruled that there is no pendent-party jurisdiction in FTCA cases, we agree with petitioner that the petition for a writ of certiorari should be granted in this case.

1. There is a clear and persistent conflict among the circuits on the question whether district courts may exercise pendent-party jurisdiction in FTCA cases. The Ninth

[3] In response to the court of appeals' show-cause order, petitioner included a request for hearing en banc. Presumably because the request was not responsive to the court's order, the court of appeals did not comment on it in summarily reversing the district court decision (Pet. App. A1-A2). Petitioner did not seek rehearing after the summary reversal, but instead filed the instant petition to this Court.

[4] Certiorari was dismissed by stipulation after the Court was informed that, subsequent to the court of appeals' decision, the government had impleaded the party that the plaintiff had sought to bring into the case under a claim of pendent-party jurisdiction. The impleader brought that party into the case under the independent grant of jurisdiction in 28 U.S.C. 1345, thereby altering the question before the Court.

Circuit has long answered that question in the negative, requiring an independent basis of jurisdiction over any party other than the United States in an FTCA case. *Idaho* v. *United States Dep't of the Army, Corps of Engineers,* 666 F.2d 444, 446, cert. denied, 459 U.S. 823 (1982); *Ayala,* 550 F.2d at 1198; *Williams* v. *United States,* 405 F.2d 951, 954 (1969). Indeed, the Ninth Circuit has rejected the doctrine of pendent-party jurisdiction not only in FTCA cases but in several other contexts as well, relying at bottom on the view that the doctrine is inconsistent with the limited grant of jurisdiction to the federal courts in Article III of the Constitution. *E.g., Carpenters Southern Cal. Admin. Corp.* v. *D & L Camp Constr. Co.,* 738 F.2d 999, 1000 (1984) (ERISA, 29 U.S.C. 1132); *Safeco Ins. Co.* v. *Guyton,* 692 F.2d 551, 555 & n.5 (1982) (diversity); *Munoz* v. *Small Business Admin.,* 644 F.2d 1361, 1365 (1981) (15 U.S.C. 634(b)(1)); *Ayala,* 550 F.2d at 1198-1201 & n.8 (emphasis in original) ("our difficulty with pendent party jurisdiction is a *constitutional* one under Article III").

In contrast, the Tenth and the Eleventh Circuits have held that the district courts have the power to exercise pendent-party jurisdiction in FTCA actions against the United States. *Stewart* v. *United States,* 716 F.2d 755, 757-759 (10th Cir. 1982), cert. denied, 469 U.S. 1018 (1984); *Lykins* v. *Pointer, Inc.,* 725 F.2d 645, 647-649 (11th Cir. 1984); see *Brown* v. *United States,* 838 F.2d 1157, 1159 n.5 (11th Cir. 1988). Those circuits have concluded, first, that Article III permits the exercise of pendent-party jurisdiction in appropriate cases and, second, that Congress intended, at least implicitly, to allow such jurisdiction when it enacted the FTCA. See, *e.g., Stewart,* 716 F.2d at 757-759; *Lykins,* 725 F.2d at 647-649.[5]

[5] Contrary to petitioner's suggestion (Pet. 8 & n.4), the First Circuit's decision in *Ortiz* v. *United States Gov't,* 595 F.2d 65 (1979), does not squarely conflict with the Ninth Circuit's position. In *Ortiz,* the party against whom the plaintiff's state-law claims were made was already in the lawsuit and subject to the court's jurisdiction, because the United States had filed a third-party complaint against that party (*id.* at 70), a complaint over which the court had jurisdiction under 28 U.S.C. 1345. As the First Circuit noted (595 F.2d at 71 n.8), that was not so in *Ayala* at the time of the Ninth Circuit decision. As this Court has made clear, "there is a [less] serious obstacle to the exercise of pendent [party] jurisdiction" when the state-law claim is to be litigated between "parties already before the court" (*Aldinger,* 427 U.S. at 18; see *Ortiz,* 595 F.2d at 72). In fact, in *Ayala,* the filing of a third-party complaint after the court of appeals' decision transformed the original *Ayala* question into an *Ortiz* question and thereby led to the dismissal of certiorari. Here, the City and the Utility have not been impleaded and are not "already before the court."

2. It has been settled since this Court's decision in *United Mine Workers* v. *Gibbs, supra,* that federal courts have the power under Article III of the Constitution to exercise pendent-*claim* jurisdiction, *i.e.,* jurisdiction over "additional *claims* between parties with respect to whom there is federal jurisdiction" (*Aldinger,* 427 U.S. at 6 (emphasis in original)). By contrast, this Court has not resolved the general question whether the federal courts may exercise pendent-*party* jurisdiction, *i.e.,* jurisdiction over "additional *parties* with respect to whom there is no independent basis of federal jurisdiction" (*ibid.* (emphasis in original)). The Court has repeatedly made clear, however, that "there is a significant difference between" pendent-party jurisdiction and pendent-claim jurisdiction because the former "require[s] [the court] to bring an entirely new party—a new defendant—into [the] litigation." *Moor* v. *County of Alameda,* 411 U.S. 693, 713 (1973). See *Owen Equip. & Erection Co.* v. *Kroger,* 437 U.S. 365, 370 (1978) ("[t]he *Gibbs* case differed from this one in that it involved * * * the resolution of a plaintiff's federal- and state-law claims against a single defendant"); *Aldinger,*

427 U.S. at 14.[6] The Court also has several times admonished that the general question whether federal courts may exercise pendent-party jurisdiction consistent with Article III is "a subtle and complex question with far-reaching implications." *Moor,* 411 U.S. at 715; see *Aldinger,* 427 U.S. at 2, 18.[7]

In *Aldinger,* the leading decision on the subject of pendent-party jurisdiction, the Court avoided that difficult question by directing its inquiry to the particular statutes under which the case was brought to federal court in the first place. That approach followed from the fundamental principle that "federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress" (427 U.S. at

[6] The *Aldinger* Court stated (427 U.S. at 14):

> The situation with respect to the joining of a new party * * * strikes us as being both factually and legally different from the situation facing the Court in *Gibbs* and its predecessors. From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state-law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to join an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant "derive from a common nucleus of operative fact."

[7] In a case like *Aldinger,* the constitutional question posed by a claim of pendent-party jurisdiction is whether a non-federal claim against a new party may be brought within the "Case[] * * * arising under [federal law]" that the federal-law claim against the principal defendants creates.

15).[8] If a claim against a pendent party is outside the jurisdiction contemplated in the relevant statutes, the Court concluded, neither the constitutional question nor questions about whether pendent-party jurisdiction is *generally* available need be reached.

Thus, the Court explained, whether pendent-party jurisdiction exists in a particular case "turns initially, not on the general contours of the language in Art. III, * * * but upon the deductions which may be drawn from congressional statutes as to whether Congress wanted to grant this sort of jurisdiction to federal courts" (427 U.S. at 16-17). "Resolution of a claim of pendent-party jurisdiction * * * calls for careful attention to the relevant statutory language" (*id.* at 17); and "as against a plaintiff's claim of *additional* power over a 'pendent party,' the reach of the statute conferring jurisdiction should be construed in light of the scope of the cause of action as to which federal judicial power *has* been extended by Congress" (*ibid.* (emphasis in original)). The key question, the Court concluded, is "whether by virtue of the statutory grant of subject-matter jurisdiction, upon which [the plaintiff's] principal claim * * * rests, Congress has addressed itself to the *party* as to whom jurisdiction pendent to the principal claim is sought" (*id.* at 16 (emphasis in original)).

Applying those principles, the *Aldinger* Court rejected the particular claim of pendent-party jurisdiction that was before it. The plaintiff, upon bringing suit against various county officials under 42 U.S.C. 1983 and establishing jurisdiction under 28 U.S.C. 1343(3), asserted pendent-party jurisdiction over related state-law claims against the

[8] See, *e.g., Christianson* v. *Colt Indus. Operating Corp.,* No. 87-499 (June 17, 1988), slip op. 15 (" 'Courts created by statute can have no jurisdiction but such as the statute confers.' *Sheldon* v. *Sill,* [49 U.S.] 8 How. 441, 449 (1850). See also *Firestone Tire & Rubber Co.* v. *Risjord,* 449 U.S. 368, 379-380 (1981).").

county, which at the time could not be sued under Section 1983.[9] The Court held that, under the relevant statutes, the claims against the counties were "without the statutory jurisdiction of the district court" (427 U.S. at 17 (footnote omitted)). The Court reasoned that, because Congress did not intend counties to be subject to suit under Section 1983, allowing a pendent claim against a county in an action rooted in Section 1983 would have the effect of circumventing congressional intent. As the Court explained, "[p]arties such as counties, whom Congress *excluded* from liability in § 1983, * * * can argue with great force that the scope of that 'civil action' over which the district courts have been given statutory jurisdiction should not be so broadly read as to bring them *back* within that power merely because the facts also give rise to an ordinary civil action against them under state law" (427 U.S. at 17 (emphasis in original)).

The *Aldinger* Court emphasized: "we decide here only the issue of so-called 'pendent-party' jurisdiction with respect to a claim brought under §§ 1343(3) and 1983. Other statutory grants and other alignments of parties and claims might call for a different result." 427 U.S. at 18. In particular, having previously noted the judicial-economy policy argument in favor of pendent-party jurisdiction (*id.* at 14-15), the Court observed that "[w]hen the grant of jurisdiction to a federal court is exclusive, * * * as in the

[9] This Court had ruled in *Moor*, 411 U.S. at 698-710, that counties are not subject to suit under 42 U.S.C. 1983. See also *Monroe* v. *Pape*, 365 U.S. 167 (1961). That holding was overruled in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). But "*Monell* in no way qualifies the holding of *Aldinger* that the jurisdictional questions * * * are statutory as well as constitutional." *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 373 n.12 (1978). Nor does it undermine *Aldinger*'s approach in analyzing the statute to determine whether pendent-party jurisdiction is permissible.

prosecution of tort claims against the United States under 28 U.S.C. § 1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only* in a federal court may all of the claims be tried together" (427 U.S. at 18 (footnote omitted; emphasis in original)). The Court declined to consider any statute not before it, however, declaring that "it would be as unwise as it would be unnecessary to lay down any sweeping pronouncement upon the existence or exercise of [pendent-party] jurisdiction" (*ibid.*). The Court concluded by reiterating that, in any particular case, "[b]efore it can be concluded that such jurisdiction exists, a federal court must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence" (*ibid.*).

3. In this case as in *Aldinger*, the constitutional question of pendent-party jurisdiction need not and should not be reached. In fact, to the extent that the Article III foundation for FTCA jurisdiction is not the grant of jurisdiction over "all Cases * * * arising under" federal law (as in *Aldinger*), but instead the grant of jurisdiction over "Controversies to which the United States shall be a Party," the constitutional difficulty here may be greater than it was in *Aldinger*: it may be that a non-federal claim against a new party can more readily be deemed within the "Case[]" arising under federal law against another party (see note 7, *supra*) than a claim against a person other than the United States can be deemed within the "Controvers[y] to which the United States [is] a Party." Of course, statutes should be construed, if possible, to avoid raising serious constitutional questions. See, *e.g.*, *Webster* v. *Doe*, No. 86-1294 (June 15, 1988), slip op. 10. In any event, even apart from that principle, the approach set forth in *Aldinger* leads in this case to the conclusion that recognizing pendent-party jurisdiction over parties other than the United States

would be inconsistent with the careful limits on the jurisdiction granted by Congress in the FTCA.

The answer in the FTCA context to the fundamental question whether "Congress has addressed itself to the *party* as to whom jurisdiction pendent to the principal claim is sought" (*Aldinger*, 427 U.S. at 16 (emphasis in original)) is clear. Here, as in *Aldinger* itself, Congress "undoubtedly has done so" (*ibid.*). The FTCA confers upon the federal courts jurisdiction to hear certain suits "*against the United States.*" 28 U.S.C. 1346(b) (emphasis added). It does so, moreover, in language that refers only to the specific claim against the government, conferring jurisdiction over "civil actions *on claims* against the United States" (*ibid.* (emphasis added)). Thus, Congress expressly limited FTCA jurisdiction to a single party, the United States.

Petitioner's only response on the merits is a policy argument (Pet. 9-10). She notes (Pet. 6, 7), as *Aldinger* did (427 U.S. at 18), that there is exclusive federal jurisdiction over FTCA suits under 28 U.S.C. 1346(b).[10] Hence, "*only* in a federal court may all of the [plaintiff's] claims be tried together" (*Aldinger*, 427 U.S. at 18 (footnote omitted; emphasis in original)). Based on the simple theory that one suit is better than two, petitioner thus argues that fairness to her and considerations of judicial economy weigh in favor of recognizing pendent-party jurisdiction under the FTCA.

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[10] Contrary to petitioner's statement (Pet. 6) and the apparent views of the Tenth Circuit (*Stewart*, 716 F.2d at 758) and the Eleventh Circuit (*Lykins*, 725 F.2d at 648), the *Aldinger* Court's reference to the FTCA was in no way an approval of pendent-party jurisdiction under the FTCA. The reference was by its terms merely an illustration that different statutes raise different problems, and it was made in the course of the Court's explanation of why it was expressly declining to rule on any case not squarely before it. See pages 10-11, *supra*.

Although that argument might have a legitimate bearing on the application of a jurisdiction-granting statute that made no reference to the range of parties that may be brought into federal court, the FTCA is not such a statute. Rather, the FTCA explicitly specifies the party defendant over whom the statute confers jurisdiction. As this Court has several times held, a pure policy argument such as petitioner's cannot justify expanding jurisdiction beyond the limits deliberately set by Congress. See *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. at 377 (rejecting argument based on "the convenience of litigants [and] considerations of judicial economy," holding that court has no jurisdiction over claim by plaintiff in diversity action against impleaded third-party defendant, where there is no independent basis of federal jurisdiction over that claim); *Aldinger* v. *Howard, supra* (rejecting judicial-economy argument for pendent-party jurisdiction where allowing such jurisdiction would violate limits on federal suits set by 42 U.S.C. 1983 and 28 U.S.C. 1343(3)).

In any event, an assessment of gains in efficiency from allowing pendent-party jurisdiction, and the relevance of such gains to determining whether such jurisdiction is permissible notwithstanding the express language of 28 U.S.C. 1346(b), must be far less simplistic than petitioner's one-suit-rather-than-two analysis. It must take account of the numerous special rules that Congress has established for FTCA litigation. For example, an FTCA claim against the government must be tried without a jury (28 U.S.C. 2402), whereas any pendent state-law claims would generally be subject to trial by jury under the Seventh Amendment. (Petitioner requested a jury trial here.) The government can be held liable only for negligent or wrongful conduct, not on a strict-liability theory (28 U.S.C. 1346(b), 2680(a); *Laird* v. *Nelms*, 406 U.S. 797 (1972)), and cannot be liable for punitive

damages (28 U.S.C. 2674). A claimant must file an administrative claim within two years of accrual and cannot file suit beyond six months after the claim has been denied or not acted on (28 U.S.C. 2401(b), 2675(a)). The amount requested in the administrative claim sets a presumptive cap on the damages in the suit (28 U.S.C. 2675(b)). The government may claim any of numerous defenses, exemptions, and immunities, including those for discretionary functions (28 U.S.C. 2680(a)), specified intentional torts (28 U.S.C. 2680(h)), and activities incident to military service (*Feres* v. *United States*, 340 U.S. 135 (1950)).

Those rules are significant, first, because they evince a deliberate effort by Congress carefully to circumscribe the nature and extent of FTCA litigation. That congressional approach underscores the importance of respecting the single-party limit on the jurisdictional grant of 28 U.S.C. 1346(b). The rules are also significant because they make clear that recognizing pendent-party jurisdiction over nongovernment alleged tortfeasors would not in fact produce much of the efficiency petitioner alleges. Thus, the government would not have to proceed to trial in many cases in which nongovernment defendants would; both in discovery and at trial, different issues would often be presented against different defendants; and different fact-finders (judge and jury) frequently would have to try the issues.[11]

Further, even if pendent-party jurisdiction produced some gains in efficiency, only state courts would benefit,

[11] In *Moor* v. *County of Alameda*, 411 U.S. 693, 715-717 (1973), this Court upheld a district court's decision not to exercise pendent-party jurisdiction in a particular case based in part on the fact that different rules would apply to the principal defendant and the "pendent" defendant. In FTCA suits, there are always such differences.

because the alleged gains in efficiency would derive from a one-way shifting of state-court suits into federal court. Also, recognizing pendent-party jurisdiction under the FTCA would undoubtedly encourage some plaintiffs to file FTCA actions against the government that would not otherwise be filed, for the sole purpose of obtaining a federal forum for their ordinary state-law tort claims against others. Cf. *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. at 374 & n.17. Because of the wide array of activities in which the government is involved and the difficulty of identifying such improperly filed cases early in the litigation, the potential increased burden on the government and the federal courts might be significant even if the exercise of pendent-party jurisdiction, like the exercise of pendent-claim jurisdiction, is discretionary.

In sum, petitioner's judicial-efficiency argument is no justification for ignoring Congress's express decision to restrict the jurisdiction created by the FTCA to claims against the government. Recognizing pendent-party jurisdiction in this case would effect an evasion of the FTCA's limits. The decision of the court of appeals is therefore correct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General
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JULY 1988

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JOINT

APPENDIX

(3)

No. 87-1973

Supreme Court, U.S.
FILED
NOV 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

BARBARA FINLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 2, 1988

CERTIORARI GRANTED OCTOBER 3, 1988

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CASE NO. 86-1151-S(M)

Date	Filings-Proceedings
05/09/86	Plaintiff filed Complaint for Wrongful Death and Personal Injury and Demand for a Jury Trial.
06/25/86	Plaintiff returned Summons with Proof of Service on authorized agent for defendant United States on 05/19/86, and on United States Attorney General on 06/11/86.
07/18/86	Defendant United States of America filed Answer to Complaint.
03/06/87	Plaintiff filed Notice and Motion to Amend Complaint, to be heard 03/30/87.
03/10/87	Court files Scheduling Order setting the last date to join other parties or to amend the pleadings shall be 11/09/87.
03/20/87	Defendant United States files Opposition to Plaintiff's Motion to Amend the Complaint.
03/25/87	Plaintiff files Reply to Defendant's Opposition to Plaintiff's Motion to Amend Complaint.
03/30/87	Order entered granting Plaintiff's Motion to Amend Complaint. Plaintiff to prepare the Order.
04/14/87	Plaintiff files Proposed Order granting Plaintiff's Motion for Leave to Amend.
04/16/87	Order entered on Plaintiff's Proposed Order filed 04/14/87, stating: Plaintiff's Motion for Leave to Amend is granted; that pendent-

party jurisdiction over the City of San Diego and San Diego Gas & Electric Co. is asserted, and the question is certified for immediate interlocutory appeal pursuant to 28 U.S.C. section 1292 (b).

03/28/88 Received Order from United States Court of Appeals for the Ninth Circuit ordering and adjudicating that the Appeal in this cause is summarily reversed under *Ayala v. United States,* 550 F.2d 1196 (9th Cir. 1977).

05/23/88 Notice of Hearing filed requisite to filing the certified copy of the Order of the U.S. Court of Appeals summarily reversing the decision of the U.S. District Court under *Ayala v. United States,* supra,. Hearing on 07/05/88.

07/05/88 Order entered filing certified copy of Order of United States Court of Appeals reversing Order U.S. District Court. Judgment from the United States Court of Appeals entered ordering that the Appeal in this case is summarily reversed under *Ayala v. United States,* supra.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Date	Filings-Proceedings
04/27/87	Defendant-Appellant, United States of America, files Petition for Permission to take an Interlocutory Appeal.
05/04/87	Plaintiff-Appellee, BARBARA FINLEY, filed Opposition to Petition for Permission to take an Interlocutory Appeal.
07/07/87	Order entered granting Government's Petition for Permission to Appeal, and Order to Plaintiff-Appellee, BARBARA FINLEY, to show cause why the District Court's Order should not be summarily reversed under *Ayala v. United States,* 550 F.2d 1196 (9th Cir. 1977).
07/28/87	Plaintiff-Appellee, BARBARA FINLEY, files Appellee's Brief to Show Cause why District Court's Order should not be summarily reversed and Petition for En Banc Hearing.
07/30/87	San Diego Gas & Electric Co. files Motion to Consider Amicus Show Cause Memorandum and Memorandum.
08/11/87	Defendant-Appellant files Response to Appellee's Brief to Show Cause why District Court's Order should not be summarily reversed.
03/04/88	Order entered summarily reversing the Order of the District Court under *Ayala v. United States,* supra. (Entry date 03/08/88) Disposition reported. Case deemed submit-

ted and terminated on merits without hearing.

03/25/88 Notice that Certified copy of Decree of Court is being directed to all counsel. Mandate Issued.

06/09/88 Received notice from Supreme Court: Petition for Certiorari filed on 06/02/88.

10/11/88 Received notice from Supreme Court, Petition for Certiorari granted on 10/03/88.

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Attorneys for Plaintiff,
BARBARA FINLEY.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BARBARA FINLEY, Individually, and as Personal Representative of the Estates of ROBERT FINLEY, ROBBIN FINLEY, RENEE FINLEY, and SCOTT FINLEY, Deceased, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	CIVIL ACTION NO. 86-1151-S(M) COMPLAINT FOR WRONGFUL DEATH AND FOR PERSONAL INJURY; DEMAND FOR JURY TRIAL. (Filed May 9, 1986)

BARBARA FINLEY, Individually and as Personal Representative of the Estates of ROBERT FINLEY, ROBBIN FINLEY, RENEE FINLEY and SCOTT FINLEY, by and through her attorneys, Hillyer & Irwin and

Speiser, Krause & Madole, for her Complaint alleges as follows:

THE PARTIES

1. BARBARA FINLEY is a resident of the county of San Diego, the widow of ROBERT FINLEY, deceased, and the mother of ROBBIN FINLEY, deceased, RENEE FINLEY, deceased, and SCOTT FINLEY, deceased.

2. BARBARA FINLEY is the Personal Representative of the Estates of ROBERT FINLEY, ROBBIN FINLEY, RENEE FINLEY and SCOTT FINLEY.

3. The UNITED STATES OF AMERICA, by and through its administrative agency, the Federal Aviation Administration (hereafter the FAA), operates and maintains navigational and operational facilities at Montgomery Field, an airport within the County of San Diego. The Montgomery Field instrument approach lighting system for Runway 28 right at Montgomery Field is included amongst those facilities operated and maintained by the FAA. Additionally, the FAA operates a radar approach control located at Miramar Naval Air Station within the County of San Diego, for the purpose (amongst others) of providing radar control of aircraft making instrument approaches to Runway 28 right at Montgomery Field.

JURISDICTION

4. This Court has jurisdiction over this matter by virtue of the provisions of 28 U.S.C. § 1346(b) and 28 U.S.C. § 2674.

5. Pursuant to 28 U.S.C. § 1402(b), venue in this district is proper inasmuch as the acts or omissions complained of occurred within this district.

6. Pursuant to 28 U.S.C. § 2675, plaintiff herein has submitted an administrative claim to the FAA. In an undated letter, received by plaintiff's counsel on November 18, 1985, plaintiff's claim was denied.

THE ACCIDENT

7. On November 11, 1983, Beechcraft Baron N911SC, while operating on an instrument flight rules flight plan in instrument meteorological conditions commenced an instrument landing system (hereafter ILS) approach to Runway 28 right at Montgomery Field, at or about 10:21 p.m. PST. At the time the ILS approach was commenced, the plane was being piloted by Tom Lessard, and his passengers were ROBERT FINLEY, ROBBIN FINLEY and RENEE FINLEY, all deceased. At all times relevant, Tom Lessard was a fully qualified and duly licensed pilot, authorized by the Federal Aviation Administration (hereafter FAA) to act as pilot-in-command of N911SC and to execute ILS approaches during instrument meteorological conditions.

8. At approximately 10:24 p.m., N911SC executed a missed ILS approach, or go-around, because the approach and runway lights at Montgomery Field were not visible. At that point, N911SC was authorized by FAA radar controllers to attempt a second ILS approach to the same runway.

9. During the second approach, at about 10:30 p.m., N911SC struck an SDG&E electric transmission line, ap-

proximately 900 feet east of Santo Road, San Diego. As a result of contacting the SDG&E transmission line, the plane descended, impacted the ground, and burst into flames and was destroyed by fire.

10. After N911SC had impacted the ground and come to rest, all four occupants, including plaintiff's decedents herein, were seen by witnesses to be alive and attempting to extricate themselves. Tom Lessard and RENEE were either thrown from the wreckage during the impact sequence, or crawled free. They were alive, removed by ambulance to hospitals and treated for burns. ROBERT FINLEY and ROBBIN FINLEY, although seen by witnesses to be alive in the wreckage, were unable to egress from the flames, and were burned to death.

11. Tom Lessard survived approximately 24 hours, and then died from his burns. RENEE FINLEY, plaintiff's decedent herein, survived 13 days before succumbing to her burns.

FIRST CAUSE OF ACTION

(NEGLIGENCE)

12. Plaintiff repeats, realleges and incorporates by reference Paragraphs 1 through 11 as though fully set forth herein.

13. At all times relevant, the FAA, as the operator and maintainer of navigational facilities at Montgomery Field, including the instrument approach lighting system utilized for Runway 28 right, held itself out as knowledgeable and competent to operate and maintain that system. The FAA knew, or in the exercise of reasonable care ought to have known, that the high intensity approach

Lighting system for Runway 28 right was relied upon and used by pilots for the purpose of acquiring visual contact with the airport and runway landing area, and in particular, during times when fog, rain and clouds reduced visibility in the area of the airport.

14. The FAA knew, or in the exercise of reasonable care ought to have known, that when the high intensity approach lighting system serving Runway 28 right at Montgomery Field was inoperative, it could provide notice to pilots using the airport by use of an advisory system called "Notice To Airmen" (NOTAMS).

15. By virtue of the foregoing the FAA had a duty to operate and maintain the high intensity approach lighting system serving Runway 28 right at Montgomery Field in an operable condition, including operation during hours when the airport traffic control tower was not operating and/or to provide notice to pilots relying upon said system when it was out of service.

16. On the night of November 11, 1983, during the time when N911SC was attempting both of its ILS approaches, the high intensity approach lighting system for Runway 28 right at Montgomery Field was inoperative, and the FAA did not issue or cause to be issued any NOTAM or any other warning of the failure of the high intensity approach lighting system, all in breach of the FAA's duties to pilots relying upon the system.

17. As a direct and proximate result of the FAA's breach of duty, as set forth above, N911SC crashed killing plaintiff's decendents, ROBERT FINLEY, ROBBIN FINLEY and RENEE FINLEY, and plaintiff has been dam-

aged as more fully set forth below in Paragraphs 22 through 27, which are incorporated herein by reference.

SECOND CAUSE OF ACTION

18. Plaintiff repeats, realleges and incorporates by reference Paragraphs 1 through 11 as though fully set forth herein.

19. At all times relevant, the FAA held itself out through its San Diego approach control facility as a provider of air traffic control services for aircraft making instrument approaches to Montgomery Field. The FAA knew, or in the exercise of reasonable care ought to have known, that pilots executing instrument approaches at Montgomery Field rely upon FAA controllers for advice and warning with regard to position, heading and altitude. FAA air traffic controllers at the San Diego approach control facility at Miramar Naval Air Station have available to them as part of their radar capability, a low altitude alert warning system. By virtue of the foregoing, the FAA had a duty to utilize its low altitude alert warning system, and to advise pilot of the activation and actuation of that system.

20. On the night of November 11, 1983, during the time that N911SC was attempting both of its ILS approaches, the low altitude alert warning system on the radar set utilized to provide air traffic control services to N911SC was not activated by its operator, and no low altitude warning was provided to the pilot of that aircraft during either approach, all in breach of the FAA's duty.

21. As a direct and proximate result of the FAA's breach of duty, as set forth above, N911SC crashed, killing plaintiff's decedents, ROBERT FINLEY, ROBBIN FINLEY, and RENEE FINLEY, and plaintiff has been damaged as more fully set forth below in Paragraph 22 through 27, which are incorporated herein by reference.

DAMAGES

22. By virtue of the death of ROBERT FINLEY, BARBARA FINLEY has suffered and will continue to suffer loss in the nature of lost support and services. In addition, she has suffered and will continue to suffer the loss of love, care, affection, comfort and society previously provided to her by ROBERT FINLEY.

23. By virtue of the death of ROBBIN FINLEY, BARBARA FINLEY will suffer future loss of support and services, and she has suffered and will continue to suffer the loss of ROBBIN's love, affection, care, comfort and society.

24. By virtue of the death of RENEE FINLEY, BARBARA FINLEY will suffer future loss of support and services, and she has suffered and will continue to suffer the loss of RENEE's love, affection, care, comfort and society.

25. Between the time of his father's death on November 11, 1983, and his own death on July 26, 1985, SCOTT FINLEY suffered loss of support and services from his father, as well as the loss of love, affection, care, comfort, society, nurture, training and advice.

26. In addition to the damages as set forth above, BARBARA FINLEY became responsible to pay and did pay on behalf of the Estates of ROBERT FINLEY, ROB-

BIN FINLEY and RENEE FINLEY, burial and funeral expenses.

27. On behalf of the Estate of RENEE FINLEY, the Personal Representative of the Estate of RENEE FINLEY became responsible to pay medical expenses for the treatment and care of RENEE FINLEY between the time of crash on November 11, 1983, and her death on November 24, 1983.

PRAYER

1. WHEREFORE, BARBARA FINLEY individually, seeks recovery from defendant UNITED STATES OF AMERICA as follows:

A. Damages for the past and future loss of support and services previously provided by her husband, ROBERT FINLEY, according to proof;

B. Damages for the past and future loss of love, affection, care, comfort and society previously provided her by her husband, ROBERT FINLEY, according to proof;

C. Damages for the future loss of support and services to be provided by her daughter, ROBBIN FINLEY, according to proof;

D. Damages for the past and future loss of love, affection, care, comfort and society previously provided by ROBBIN FINLEY, according to proof;

E. Damages for the future loss of support and services to be provided by her daughter, RENEE FINLEY, according to proof; and

F. Damages for the past and future loss of love, affection, care, comfort and society previously provided by RENEE FINLEY, according to proof.

2. WHEREFORE, plaintiff, BARBARA FINLEY, as Personal Representative of the Estate of SCOTT FINLEY, seeks recovery from defendant UNITED STATES OF AMERICA as follows:

A. Damages for the loss of support and services previously provided by his father, ROBERT FINLEY, which were lost between the time of his father's death and SCOTT FINLEY's death; and

B. Damages for loss of love, affection, care, comfort, society, guidance, training and nurture previously provided by his father, ROBERT FINLEY, which were lost between the time of his father's death and SCOTT FINLEY's death.

3. WHEREFORE, plaintiff, BARBARA FINLEY, as Personal Representative of the Estate of ROBBIN FINLEY, seeks recovery from defendant UNITED STATES OF AMERICA as follows:

A. Damages for the funeral and burial expenses for ROBERT FINLEY, according to proof; and

B. Damages for damaged and destroyed personal property, according to proof.

4. WHEREFORE, plaintiff, BARBARA FINLEY, as Personal Representattive of the Estate of ROBBIN

FINLEY, seeks recovery from defendant UNITED STATES OF AMERICA as follows:

A. Damages for the funeral and burial expenses for ROBBIN FINLEY, according to proof; and

B. Damages for damaged and destroyed personal property, according to proof.

5. WHEREFORE, plaintiff, BARBARA FINLEY, as Personal Representative of the Estate of RENEE FINLEY, seeks recovery from defendant UNITED STATES OF AMERICA as follows:

A. Medical expenses paid for the medical care and treatment of RENEE FINLEY, according to proof;

B. Damages for the funeral and burial expenses for RENEE FINLEY, according to proof; and

C. Damages for damaged and destroyed personal property, according to proof.

6. Plaintiff further prays for such other further and different relief as the Court may deem just and proper.

DATED: May 1, 1986

SPEISER, KRAUSE & MADOLE

By: /s/ Joseph T. Cook
JOSEPH T. COOK

DATED: May 6, 1986

HILLYER & IRWIN

By: /s/ Howard A. Allen
HOWARD A. ALLEN
Attorneys for Plaintiff,
BARBARA FINLEY.

JURY DEMAND

Plaintiff, BARBARA FINLEY, by and through her attorneys, demand a trial by jury.

DATED: May 1, 1986

SPEISER, KRAUSE & MADOLE
By: /s/ Joseph T. Cook
JOSEPH T. COOK

DATED: May 6, 1986

HILLYER & IRWIN

By: /s/ Howard A. Allen
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Attorneys for Plaintiff,
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United States of America

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BARBARA FINLEY, Individually and as Personal Representative of the Estates of ROBERT FINLEY, ROBBIN FINLEY, RENEE FINLEY, and SCOTT FINLEY, Deceased,	Civil No. 86-1151-S(M)
Plaintiff,	
v.	ANSWER TO COMPLAINT
UNITED STATES OF AMERICA,	(Filed July 18, 1986)
Defendant.	

COMES NOW the defendant, United States of America, by and through its counsel, Peter K. Nunez, United States Attorney, Southern District of California, and Michael E. Quinton, Assistant United States Attorney, and in response to the complaint herein alleges, avers and states as follows:

1. The defendant is without sufficient information to either admit or deny the allegations in Paragraph 1 of the complaint and, on that basis, denies the allegations.

2. The defendant is without sufficient information to either admit or deny the allegations in Paragraph 2 of the complaint and, on that basis, denies the allegations.

3. The defendant admits that the Federal Aviation Administration is an agency of the United States, that the Federal Aviation Administration operates and maintains navigational and operational facilities at Montgomery Field, San Diego, California, that the Montgomery Field instrument approach lighting system for Runway 28 right at Montgomery Field is operated and maintained by the Federal Aviation Administration. The defendant admits that the Federal Aviation Administration operates a radar approach control facility located at Naval Air tSation, Miramar, but denies that the radar approach control facility located at Naval Air Station, Miramar provides radar control of aircraft making instrument approaches to Runway 28 right at Montgomery Field. The defendant avers that the radar approach control facility located at Naval Air Station, Miramar, provides radar services to some aircraft making instrument approaches to Runway 28 right at Montgomery Field.

4. The defendant avers that the allegations in Paragraph 4 of the complaint present a legal question for the court and, therefore, no response is required. To the extent that a response may be required, the allegations are denied.

5. The defendant admits the allegations in Paragraph 5 of the complaint.

6. The defendant admits the allegations in Paragraph 6 of the complaint.

7. The defendant denies the allegations in Paragraph 7 of the complaint.

8. The defendant denies the allegations in Paragraph 8 of the complaint.

9. The defendant admits the allegations in Paragraph 9 of the complaint.

10. The defendant denies the allegations in Paragraph 10 of the complaint.

11. The defendant is without sufficient information to either admit or deny the allegations in Paragraph 11 of the complaint and, on that basis, denies the allegations.

12. Answering Paragraph 12, the defendant repeats, realleges and incorporates by reference its answers to Paragraph 1 through 11 as though fully set forth herein.

13. The defendant admits that the Federal Aviation Administration maintains certain navigational facilities at Montgomery Field, including the instrument approach lighting system utilized for Runway 28 right and that the instrument lighting system for Runway 28 right may be utilized by pilots in some weather conditions while making approaches to Runway 28 right. The defendant denies the remainder of the allegations in Paragraph 13 of the complaint.

14. The defendant admits that when the Federal Aviation Administration acquired knowledge of a failure in a navigational aid it could, under certain circumstances, provide notice to pilots by means of a Notice to Airman

(NOTAM). The defendant denies the remainder of the allegations in Paragraph 14 of the complaint.

15. The defendant avers that the allegations in Paragraph 15 of the complaint present a legal question for the court and, therefore, no response is required. To the extent that a response may be required, the allegations are denied.

16. The defendant denies the allegations in Paragraph 16 of the complaint.

17. The defendant denies the allegations in Paragraph 17 of the complaint.

18. Answering Paragraph 18, the defendant repeats, realleges and incorporates by reference its answers to Paragraphs 1 through 11 as though fully set forth herein.

19. The defendant denies the allegations in Paragraph 19 of the complaint.

20. The defendant denies the allegations in Paragraph 20 of the complaint.

21. The defendant denies the allegations in Paragraph 21 of the complaint.

22. The defendant denies the allegations in Paragraph 22 of the complaint.

23. The defendant denies the allegations in Paragraph 23 of the complaint.

24. The defendant denies the allegations in Paragraph 24 of the complaint.

25. The defendant denies the allegations in Paragraph 25 of the complaint.

26. The defendant is without sufficient information to either admit or deny the allegations in Paragraph 26 of the complaint and, on that basis, denies the allegations.

27. The defendant is without sufficient information to either admit or deny the allegations in Paragraph 27 of the complaint and, on that basis, denies the allegations.

AFFIRMATIVE DEFENSES

1. The complaint fails to state a claim upon which relief can be granted to the plaintiff against the defendant under the Federal Tort Claims Act (Title 28, United States Code, §§ 1345(b), 2671-2680), as averred in the complaint or otherwise, for the reason that if the defendant were a private person, it would not be liable to the plaintiff in accordance with the law of the State of California.

2. The defendant and its agents exercised due care and diligence toward the injured parties at all times and no act or failure to act by the defendant or its agents or employees was the actual cause or proximate cause of the injuries or damages alleged in the complaint or otherwise.

3. The injuries alleged were not caused by carelessness or negligence on the part of the defendant, its agents, servants or employees, but was caused solely by and through the carelessness and negligence of other parties.

4. The court lacks jurisdiction over the subject matter of this action.

5. The defendant had no legal duty of any nature to the injured parties regarding the circumstances complained of.

WHEREFORE, defendant prays that the plaintiff take nothing by reason of her suit, that judgment be rendered in favor of the defendant for its costs of suit incurred and for such other and further relief as this Court may deem just.

DATED: July 18, 1986

PETER R. NUNEZ
United States Attorney
/s/ Michael E. Quinton
MICHAEL E. QUINTON
Assistant U.S. Attorney

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Attorneys for Plaintiff
BARBARA FINLEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BARBARA FINLEY, individually, and as Personal Representative of the Estates of ROBERT FINLEY, ROBIN FINLEY, RENEE FINLEY, and SCOTT FINLEY, deceased, Plaintiff, - vs - UNITED STATES OF AMERICA, CITY OF SAN DIEGO, and SAN DIEGO GAS & ELECTRIC COMPANY, Defendants.	)	CIVIL ACTION NO. 86-1151-S(M) NOTICE OF MOTION TO AMEND PLAINTIFF'S COMPLAINT DATE: MARCH TIME: 10:30 a.m. COURT-ROOM: 4 JUDGE SCHWARTZ (Filed March 6, 1987)

TO THE PARTIES AND THEIR ATTORNEY'S OF RECORD:

PLEASE TAKE NOTICE that on March 30, 1987, at 10:30 a.m., in the courtroom of the Honorable Edward

J. Schwartz in the United States District Court for the Southern District of California, 940 Front Street, San Diego, California, the plaintiff will bring on her motion for leave to amend her complaint.

Dated: March 2, 1987

SPEISER, KRAUSE & MADOLE
By: /s/ Joseph T. Cook
JOSEPH T. COOK

OF COUNSEL:

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BARBARA FINLEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BARBARA FINLEY, individually, and as Personal Representative of the Estates of ROBERT FINLEY, ROBIN FINLEY, RENEE FINLEY, and SCOTT FINLEY, deceased,	)	CIVIL ACTION NO. 86-1151-S(M)
Plaintiff,	)	MOTION TO AMEND COMPLAINT
- vs -	)	
UNITED STATES OF AMERICA, CITY OF SAN DIEGO, and SAN DIEGO GAS & ELECTRIC COMPANY,	)	DATE: MARCH 30, 1987 TIME: 10:30 a.m. COURT-ROOM: 4 JUDGE SCHWARTZ
Defendants.	)	

TO THE PARTIES AND THEIR ATTORNEY'S OF RECORD:

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure the plaintiff moves this Court for leave to amend her complaint in order to include in this case defendants and claims arising from the same occurrences and circumstances that heretofore have been the subject matter of a state court action. The basis for plaintiff's motion can be found in the plaintiff's memorandum of law filed contemporaneous herewith.

Dated: March 2, 1987

SPEISER, KRAUSE & MADOLE
By: /s/ Joseph T. Cook
JOSEPH T. COOK

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Attorneys for Plaintiff
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BARBARA FINLEY, individually, and as Personal Representative of the Estates of ROBERT FINLEY, ROBIN FINLEY, RENEE FINEY, and SCOTT FINLEY, deceased, Plaintiff, - vs - UNITED STATES OF AMERICA, CITY OF SAN DIEGO, and SAN DIEGO GAS & ELECTRIC COMPANY, Defendants.	CIVIL ACTION NO. 86-1151-S(M) MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO AMEND COMPLAINT DATE: MARCH 30, 1987 TIME: 10:30 a.m. COURT-ROOM: 4 JUDGE SCHWARTZ Filed March 6, 1987

MEMORANDUM OF LAW

I.

FACTUAL BACKGROUND

On November 11, 1983, a Beechcraft Baron aircraft No. N911SC, while operating on an instrument flight rules (IFR) flight plan in instrument meteorological conditions commenced an instrument landing system (hereafter ILS) approach to land on Runway 28 right at Montgomery Field, at or about 10:21 p.m. PST. At approximately 10:24 p.m., N911SC executed a missed approach, or go-around, because the approach and runway lights at Montgomery Field was not visible and, as a result, the pilot did not observe the runway to effectuate a safe landing. At that point N911SC was authorized by FAA radar controllers to attempt a second ILS approach to the same runway.

During the second attempt to land through the use of an ILS approach, at 10:38 p.m., N911SC struck an SDG&E electric transmission line, approximately 900 feet each of Santo Road, San Diego. As a result of contacting the SDG&E transmission line, the plane descended, impacted the ground burst into flames and was destroyed by fire.

After N911SC had impacted the ground and come to rest, all four occupants, including plaintiff's decedents herein, were killed in the resulting flames or succumbed to burn injuries directly following the accident.

II.

AMENDMENT TO PLEADINGS IS PROPER UNDER FEDERAL RULES OF CIVIL PROCEDURE, RULE 15(a)

Rule 15(a) of the Federal Rules of Civil Procedure states in pertinent part, " . . . a party may amend his pleading . . . by leave of court . . . ; and leave shall be freely given when justice so requires." Here, plaintiff seeks to amend her complaint to add two (2) additional parties, the CITY OF SAN DIEGO, and the SAN DIEGO GAS & ELECTRIC COMPANY, and to add claims against those two (2) additional parties for damages which arise from the same occurrence which forms the basis for the plaintiff's existing lawsuit against the UNITED STATES. These additional parties have been defendants in a state court action. The chronology of events leading up to this motion are set forth in more particular detail in the declaration of Joseph T. Cook, counsel for plaintiff, attached hereto as Exhibit "A" to this memorandum.

This memorandum will cover two legal issues: First, whether the exercise of pendent jurisdiction by this Court over the two additional defendants, the CITY OF SAN DIEGO, and SAN DIEGO GAS & ELECTRIC COMPANY, is proper. Second this memorandum will address plaintiff's right to amend by adding those two defendants. If pendent jurisdiction is indeed appropriate in this action, then leave to amend so as to add the additional defendants and the claims against them clearly is required. However, if pendent jurisdiction is denied, there will be no need for any amendment to the existing complaint.

III.

PENDENT JURISDICTION IS A VALID EXERCISE OF THE COURT'S DISCRETIONARY POWER

Pendent jurisdiction allows a Federal Court, which has valid jurisdiction over one of plaintiff's claims, to take jurisdiction over another of the plaintiff's claims, although no independent basis for federal jurisdiction exists over the latter. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The *Gibbs* Court established four requirements for the valid exercise of pendent jurisdiction, all of which exist in the case at *bar*.

(1) The initial Federal claim arose under the constitution, laws, or treaties of the United States;

(2) The relationship between the federal and state claims permit the conclusion that the two actions constitute one "case";

(3) The federal claims confers subject matter jurisdiction on the court;

(4) The state and federal claims derive from a common nucleus of operative facts.

As set forth in the declaration of Joseph T. Cook, the plaintiff's claim against the UNITED STATES and against the CITY OF SAN DIEGO and against the SAN DIEGO GAS & ELECTRIC COMPANY all arise from the crash of a light twin engine aircraft approximately one mile east of Montgomery Field in San Diego on November 11, 1983. Testimony concerning the precise manner in which the accident occurred, the relative responsibilities, duties and liabilities of the parties and the assessment of damages will be substantially the same as

against all defendants. The exercise of pendent jurisdiction by this Court over the claims against SAN DIEGO GAS & ELECTRIC COMPANY and the CITY OF SAN DIEGO will result in judicial economy, increased convenience and fairness to the litigants by consolidating separate actions in the state and federal courts into one proceeding. *Moore v. County of Alameda*, 411 U.S. 693 (1973), *reh den* 412 U.S. 963 (ovrld on other grounds; *Monell v. Department of Social Services*, 436 U.S. 658). The consolidation of these actions will also result in a great savings of time and expense to the parties and avoid the possibility of conflicting or inconsistent verdicts.

There is authority within the 9th Circuit which suggests that when the federal court's principal basis for jurisdiction is the Federal Tort Claims Act (FTCA), pendent jurisdiction ought not be exercised absent some independent basis of jurisdiction such as diversity. *Ayala, et al. v. United States, et al.*, 550 F.2d 1196 (9th Cir. 1977). *Ayala*, however, can readily be distinguished from the case at bar. In *Ayala*, the plaintiff's federal claims against the United States alleged negligent operation, while their state claims agains the non-diverse defendants were product liability claims. The claims were thus different in kind and quality. Additionally, in *Ayala* there were no third-party claims or cross-claims between the various defendants for contribution and indemnity as there are in the case at bar.

In the instant case, one of plaintiff's claims against the UNITED STATES and the state claims against the CITY OF SAN DIEGO are identical. Against both defendants, plaintiff claims that the approach lights to the

airport were not operating, and that the negligence of both the CITY and the UNITED STATES gave rise to that circumstance. It would be far more economical, convenient, and consistent to sort out the various duties and responsibilities with respect to plaintiff's allegations regarding the approach lights in the same forum. Since this Court has exclusive jurisdiction as to plaintiff's claims against the UNITED STATES, the Court is urged to follow the Supreme Court's dictates in another 9th Circuit case when it stated:

> When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. section 1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only* in a federal court may all of the claims be tried together. *Aldinger v. Howard*, 427 U.S. 1, 18, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976) (emphasis in original).

Further, all of plaintiff's claims against all of the defendants relate to what might be called "operational" negligence—acts or omissions which jointly cause plaintiff's damages. There is no claim here of different quality, such as the product liability claim found in *Ayala*.

Although *Ayala* can be clearly distinguished from this case, it should also be pointed out that the strength of *Ayala* has been eroded. Virtually all later decisions throughout the United States have supported the use of pendent jurisdiction as a means to improve efficiency and economy of judicial resources. Specifically, courts have indicated that without pendent jurisdiction the plaintiff could not gather all parties involved in an air crash in a

local state court since federal courts have exclusive jurisdiction over actions against the United States under the FTCA. Therefore, the FTCA could be used as an "anchor" to hold state claims within the federal court's jurisdiction through the exercise of pendent jurisdiction. *In re N-500L Cases* 502 F. Supp. 60 (D.C. Puerto Rico 1980). See also: *Potter v. Rain Brook Feed Co. Inc.*, 530 F.Supp. 569 (E.D. Cal. 1982); *Ortiz v. United States*, 595 F.2d 65 (1st Cir. 1979); *Maltais v. United States* 439 F.Supp. 540 (N.D. N.Y. 1977); *Davis v. United States*, 350 F.Supp. 206 (E.D. Mich. 1972).

In another 9th Circuit case which involved an air-crash, the Court stated in Note 2 that although the issue was not argued by the parties on appeal, the District Court's dismissal of the pendent claim is "open to some question." *Mattschei v. United States*, 600 F.2d 205, 207 (9th Cir. 1979). The *Mattschei* Court went on the cite numerous cases in which pendent jurisdiction was upheld.

In view of the absolute requirement that actions against the UNITED STATES be brought in federal court pursuant to 28 U.S.C. § 1346, there is no reason not to resolve all matters arising from the events giving rise to the federal claims in that same forum.

IV.

THERE BEING NO PREJUDICE TO ANY PARTY, THE MOTION SHOULD BE ALLOWED

Amendments under Rule 15(a) are to be "freely given when justice so requires" *Rosenberg Bros. & Co. v. Arnold*, 283 F.2d 406 (9th Cir. 1960) especially where no prejudice will result to the opposing party. *Manhattan Fuel Co.,*

Inc. v. New England Petroleum Corp., 422 F. Supp. 797 (D.C.N.Y. 1976), adhered to 439 F. Supp. 299 (D.C. Wisc. 1968); *Wilson v. American Chain & Cable Co.*, 216 F. Supp. 32. (D.C. Pa. 1963).

The Government has conducted no discovery in this case, and thus cannot be heard to complain of prejudice.

CONCLUSION

Leave to amend the complaint is proper in this case. Attached hereto as Exhibit "B" is plaintiff's proposed first amended complaint. The amendment simply adds the additional claims against the additional defendants, and makes no change or alteration to the claims against the UNITED STATES. The UNITED STATES will not be prejudiced by this amendment, and indeed, may be benefited by having the trial reveal all of the parties and all of the claims. For all the foregoing reasons and in the sound discretion of the Court, justice demands that plaintiff be granted leave to amend.

DATED: March 2, 1987

SPEISER, KRAUSE & MADOLE
By: /s/ Joseph T. Cook
JOSEPH T. COOK

OF COUNSEL:

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EXHIBIT "A"

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BARBARA FINLEY, individually, and as Personal Representative of the Estates of ROBERT FINLEY, ROBIN FINLEY, RENEE FINLEY, and SCOTT FINLEY, deceased, Plaintiff, - vs - UNITED STATES OF AMERICA, CITY OF SAN DIEGO, and SAN DIEGO GAS & ELECTRIC COMPANY, Defendants.	)	CIVIL ACTION NO. 86-1151-S(M) DECLARATION OF JOSEPH T. COOK IN SUPPORT OF MOTION TO LEAVE TO AMEND COMPLAINT DATE: MARCH 30, 1987 TIME: 10:30 a.m. COURT-ROOM: 4 JUDGE SCHWARTZ

1. My name is Joseph T. Cook, I am a partner in the firm Speiser, Krause & Madole, and counsel to the plaintiff in this action. I am a member of the Bar of the State of California and admitted to practice before this Court.

2. Events giving rise to this action took place on November 11, 1983, when plaintiff's husband and two daughters were killed in an airplane crash in San Diego County.

3. On September 28, 1984, a complaint was filed in the Superior Court for the County of San Diego against SAN DIEGO GAS & ELECTRIC COMPANY, BEECH AIRCRAFT CORPORATION, and DOES 1 through 20. The CITY OF SAN DIEGO and SAN DIEGO GAS & ELECTRIC COMPANY were served, BEECH AIRCRAFT CORPORATION was never served (and there is no intent to serve it) and discovery to date has disclosed no additional defendants that might be named in place of the DOES.

4. In the course of discovery against the CITY OF SAN DIEGO, the CITY claimed that approach lights at Montgomery Field were operated not by the CITY but by the United States Federal Aviation Administration (FAA). Consequently, plaintiff filed an administrative claim with the FAA. On November 18, 1985 that administrative claim was denied, and on May 9, 1986, plaintiff's complaint against the UNITED STATES was filed in this Court.

5. Sometime after the filing of the plaintiff's complaint against the UNITED STATES, SAN DIEGO GAS

& ELECTRIC COMPANY, a defendant in the state court action, filed an indemnity complaint against the UNITED STATES OF AMERICA. That case bears civil number 86-2017-G(BTM). Counsel for the UNITED STATES has filed a notice of a related case, correctly pointing out that "[t]hese actions involves common issues of fact and law and assignment to a single judge and magistrate is likely to effect a saving of judicial effort and other economies."

6. In the fall of 1986, defendant SAN DIEGO GAS & ELECTRIC COMPANY made a motion in the state court for dismissal in order that the cases may be re-filed and consolidated in federal court. Ultimately, counsel for plaintiff, SAN DIEGO GAS & ELECTRIC COMPANY and the CITY OF SAN DIEGO agree to such a course, and a stipulated application was made to the state court to effect that result. As a consequence, on January 22, 1987, the state court entered a dismissal without prejudice for the purpose of refiling in federal court, and both the CITY OF SAN DIEGO and SAN DIEGO GAS & ELECTRIC COMPANY agreed not to raise any limitations or otherwise attempt to obtain advantage by virtue of moving the cases from state court to federal court.

FURTHER AFFIANT SAITH NOT.

/s/ Joseph T. Cook
JOSEPH T. COOK

STATE OF CALIFORNIA)
) SS
COUNTY OF ORANGE)

ON THIS 2ND DAY OF MARCH, 1987, BEFORE ME A NOTARY PUBLIC, PERSONALLY APPEARED

JOSEPH T. COOK, PERSONALLY KNOWN TO ME TO BE THE PERSON WHOSE NAME IS SUBSCRIBED TO THIS INSTRUMENT, AND ACKNOWLEDGED THAT HE EXECUTED IT.

/s/ Linda A. Guss
LINDA A. GUSS
NOTARY PUBLIC

OFFICIAL SEAL
LINDA A GUSS
Notary Public - California
Orange County
My Comm. expires JUN 19, 1989

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

	)	Civil No.
	)	86-1151-S(M)
	)	
BARBARA FINLEY, etc.,	)	DATE: March 30,
	)	1987
Plaintiff,	)	TIME: 10:30 a.m.
	)	Courtroom No. 4
v.	)	
	)	OPPOSITION
UNITED STATES OF AMERICA,	)	TO MOTION
	)	TO AMEND
	)	PLAINTIFF'S
Defendant.	)	COMPLAINT
	)	
	)	(Filed March 20,
	)	1987)

COMES NOW the defendant, United States of America, by and through its counsel, Peter K. Nunez, United States Attorney, Southern District of California, and Michael E. Quinton, Assistant U.S. Attorney, in response and opposition to the plaintiff's motion to amend the complaint. This opposition is based on the files and records

of this case and on the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I

INTRODUCTION

The plaintiff has filed a motion to amend her complaint to add San Diego Gas and Electric Company and the City of San Diego as defendants.

The defendant, United States of America, opposes this motion to amend on the grounds that the amendment would be futile as this court does not have jurisdiction over claims brought against San Diego Gas and Electric Company (SDG&E) and the City of San Diego.

II

A. THE COURT SHOULD DENY LEAVE TO AMEND THE COMPLAINT IF THE AMENDMENT WOULD BE FUTILE

In her motion to amend the plaintiff acknowledges that "if pendent jurisdiction is denied, there will be no need for any amendment to the existing complaint." (P. 3 of Plaintiff's Memorandum of Law.) By this statement, the plaintiff seems to acknowledge the general rule that when a proposed amendment to a complaint is insufficient to state a claim, the court should not allow the amendment since it would be but a useless act to allow an amendment that does not state a claim. *Foman v. Davis,* 371 U.S. 178 (1962).

The principle that futile or insufficient amendments should not be allowed was clearly expressed by the Ninth

Circuit Court of Appeals in *Sackett v. Beaman*, 399 F.2d 884 (9th Cir. 1968), where it was said:

> The considerations discussed above lead us to the view that the applicable statute of limitations barred Sackett from first asserting in federal court in August 1967, a claim for damages growing out of the November 8, 1961 transaction. It would therefore have been futile for Sackett to have filed his proposed second amended complaint and, for that reason, the district court did not abuse its discretion in denying leave to do so. [Footnote omitted]

Id. at 892. *See also, DeLoach v. Woodley*, 405 F.2d 496 (5th Cir. 1968); *Hodnik v. Baltimore & Ohio Railroad*, 54 F.R.D. 184 (W.D. Penn. 1972); *Elliott v. Bloor*, 425 F. Supp. 1140, 1144 (E.D. Penn. 1976).

Therefore, the only legal issue raised by this motion is whether or not the court would have jurisdiction over the claims brought against SDG&E and the City of San Diego. If the court does not have jurisdiction over the claims against those parties, this motion must be denied.

B. THIS COURT CANNOT TAKE JURISDICTION OVER THE CLAIMS AGAINST SDG&E AND THE CITY OF SAN DIEGO AS THE COURT DOES NOT HAVE JURISDICTION OVER PENDENT PARTIES

As noted above, in her motion to amend, the plaintiff admits that her motion turns on the question of whether or not the court has pendent jurisdiction over the claims against the two defendants she wishes to add to this suit, i.e., SDG&E and the City of San Diego. The plaintiff seems to acknowledge that if pendent jurisdiction is not available as a jurisdictional basis, the court has no jurisdiction over SDG&E and the City of San Diego. This is set out in Paragraph 8 of the proposed First Amended Complaint in which the plaintiff states:

> 8. Plaintiff requests this Court to assume pendent claim jurisdiction over defendants the CITY and SDG&E. The claims set forth in the complaint against the UNITED STATES, the CITY and SDG&E are based on the same operative facts, and as a matter of convenience and fairness to the parties, this Court should assume and exercise jurisdiction over the claims against the CITY and SDG&E, inasmuch as this is the only Court that has jurisdiction over the defendant, the UNITED STATES.

The defendant, United States, asserts that the court cannot take jurisdiction over the claims against SDG&E and the City of San Diego just because the plaintiff thinks it would be "convenient and fair." Federal courts are courts of limited jurisdiction and must have a statutory basis for jurisdiction. The defendant, United States of America, asserts that there is no such statutory basis for jurisdiction over SDG&E and the City of San Diego and the court cannot, as a matter of law, take jurisdiction over the pendent party claims against SDG&E and the City of San Diego.

The plaintiff acknowledges the existence of *Ayala v. United States*, 550 F.2d 1196 (9th Cir. 1977), and characterizes *Ayala* as "authority within the Ninth Circuit which suggests that when the federal court's principal basis for jurisdiction is the Federal Tort Claims Act (FTCA), pendent jurisdiction such as diversity." (Plaintiff's Memorandum, pp. 4-5). The defendant submits that *Ayala* and the other Ninth Circuit cases which precede and follow it

do not merely suggest that pendent party jurisdiction ought not be allowed, they clearly require that it be rejected.

In *Ayala,* the Ninth Circuit Court of Appeals affirmed the consistent Ninth Circuit rejection of pendent party jurisdiction. The plaintiff attempts to distinguish *Ayala* and seems to imply that *Ayala* is the only Ninth iCrcuit case in which pendent party jurisdiction has been considered. In fact, the Ninth Circuit Court of Appeals has rejected pendent party jurisdiction in several cases; *Ayala* is only one of them. No cases could be found in which the Ninth Circuit had approved pendent party jurisdiction.

The plaintiff cites the court to *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966) as authority that the court may take pendent party jurisdiction in this case. However, the plaintiff ignores the more recent case of *Aldinger v. Howard,* 427 U.S. 1 (1976).

Aldinger v. Howard points out that *United Mine Workerst v. Gibbs* and its lineal ancestor, *Osborn v. Bank of the United States,* 9 Wheat. 738 (1824) both considered the question of pendent *claim* jurisdiction and not pendent *party* jurisdiction. Under the doctrine of pendent claim jurisdiction, a plaintiff may bring causes of action arising under state law in federal court against a defendant in federal court where a basis for jurisdiction already exists against that party in federal court. *United Mine Workers v. Gibbs,* does not consider whether or not the plaintiff could bring in a new (pendent) *party,* for which there is no indepnedent basis for federal jurisdiction but only whether a plaintiff could bring additional (pendent)

claims arising in one case against a party who is already properly in federal court. The plaintiff does not have, and does not claim to have, an independent basis for jurisdiction against the two defendants she seeks to add to this case. Therefore, the criteria discussed by the plaintiff on pages three and four of her memorandum do not apply.

The plaintiff asks the court "to assume pendent claim jurisdiction over defendants the CITY and SDG&E." However, it is clear that the plaintiff, in fact, is asking the court to assume pendent *party* jurisdiction over those defendants. The plaintiff does not wish to add claims against the City and SDG&E that would be pendent to its existing claims against those parties in this court; the plaintiff wants this court to assume jurisdiction over pendent parties as to which there is no indepndent basis for federal jurisdiction. The United States Supreme Court made the distinction between the two types of claims clear in *Aldinger v. Howard,* when it said:

> Thus, it was perfectly consistent with Art. III, and the particular grant of subject-matter jurisdiction upon which the federal claim against the defendant in those cases was grounded, to require that defendant to answer as well to a second claim deriving from the "common nucleus"' of fact, though it be of state-law vintage. This would not be an "unfair" use of federal power by the suing party, he already having placed the defendant properly in federal court for a substantial federal cause of action. Judicial economy would also be served because the plaintiff's claims were "such that he would ordinarily be expected to try them all in one judicial proceeding . . . ." *Gibbs,* 383 U.S., at 725.
>
> The situation with respect to the joining of a new party, however, strikes us as being both factually and

legally different from the situation facing the Court in *Gibbs* and its predecessors. From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state-law claim over which there is no indepndent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to join an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant "derive from a common nucleus of operative fact." *Ibid.* True, the same considerations of judicial economy would be served insofar as plaintiff's claims "are such that he would ordinarily be expected to try them all in one judicial proceeding. . . ." *Ibid.* But the addition of a completely new party would run counter to the well-established principle that federal courts, as apposed to state trial courts of general jurisdiction marked out by Congress. We think there is much sense in the observation of Judge Sobeloff, writing for the Court of Appeals in *Kenrose Mfg. Co. v. Fred Witaker Co.*, 512 F.2d 890, 894 (CA4 1972).

> "The value of efficiency in the disposition of lawsuits by avoiding multiplicity may be readily conceded, but that is not the only consideration a federal court should take into account in assessing the presence or absence of jurisdiction. Especially is this true where, as here, the efficiency plaintiff seeks so avidly is available without question in the state courts."

Id. at 14, 15.

In *Aldinger v. Howard*, the United States Supreme Court did not foreclose the question of pendent party jurisdiction entirely. The ruling was limited by its terms to cases arising under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983. The Supreme Court allowed that "other statutory grants and other alignments of parties and claims might call for a different result." *Id.* at 18.

The Fifth Circuit Court of Appeals, for example, has found this language to authorize the consolidation of claims against all parties in a case arising under the National Flood Insurance Program. *Smith v. National Flood Insurance Program*, 796 F.2d 90, 92 (5th Cir. 1986). However, the distinction is that in *Smith* the claims which were combined were all brought under 42 U.S.C. § 4072, an *exclusively* federal cause of action.

The Ninth Circuit Court of Appeals has consistently rejected pendant party jurisdiction in a case in which the basis for jurisdiction against the United States was the Federal Tort Claims Act and the claims against the other defendants were tort claims arising under state law. *Ayala v. United States*, 550 F.2d 1196 (9th Cir. 1977).

Ayala v. United States was the first case heard by the Ninth Circuit after the United State Supreme Court decision in *Aldinger v. Howard*. Therefore, it was the first case to construe the *Aldinger* dictum ("other statutory grants and other alignments of parties and claims might call for a different result") quoted above. In *Ayala* the Ninth Circuit said:

> We concluded in *Aldinger* that this court was not bound by Supreme Court dictum in *Moor* with respect both to the trend toward hearing pendant claims involving additional parties and to expanded concepts of ancilliary jurisdiction in the Federal Rules of Civil

> Procedure. *See* 513 F.2d at 1260, *citing Moor,* 411 U.S. at 713-15, 93 S.Ct. 1785. Similarly, we conclude here that we are not bound by new dictum in *Aldinger* which, in any event, merely suggests that "[o]ther statutory grants and other alignments of parties and claims *might* call for a different result." 427 U.S. at 18, 96 S.Ct. at 2422 (emphasis added).

Id. at 1200.

This rejection of pendent party jurisdiction by the Ninth Circuit was affirmed in *Safeco Ins. Co. of American v. Guyton,* 692 F.2d 551 (9th Cir. 1982). In *Safeco* the plaintiff, an insurance company, had brought an action in federal district court seeking a declaratory judgment that it was not ilable to certain policyholders under policies of flood insurance. Some of the defendant policy holders brought third party claims against the insurance agent and the agency that sold them the policies of flood insurance. The district court dismissed the third party claims as pendent party claims and the Ninth Circuit affirmed. The Ninth Circuit said:

> Policyholders argue that the district court erred in dismissing the Purpuras' third party complaint against Collins for want of subject matter jurisdiction.
>
> The claim raises the question whether a federal court may assert pendent party jurisdiction over a person who is a third party defendant in a claim brought under Rule 13(a) & (h) of the Federal Rules of Civil Procedure where the claim is unsupported by an independent federal jurisdictional base. An independent jurisdictional base is missing because the Purpuras and Collins are citizens of the same state and the claim the Purpuras assert is in negligence, a nonfederal cause of action. We conclude that pendent party jurisdiction does not exist over the Purpuras' claim against Collins.
>
> This circuit historically has been hostile to the concept of pendent party jurisdiction. *See generally* Note, *Federal Pendent Party Jurisdiction and United Mineworkers v. Gibbs—Federal Question and Diversity Cases,* 62 U.Va.L.Rev. 194, 206-08 (1976). We have repeatedly held that parties may not be added to an action absent an independent jurisdictional base for inclusion and that pendent party jurisdiction will not substitute for complete diversity or a federal question.

[Footnote omitted] *Id.* at 555.

The Ninth Circuit Court of Appeals also had occasion to consider the applicability of pendent party jurisdiction in *Carpenters Southern California Administrative Corporation v. D & L Camp Construction Company, Inc.,* 738 F.2d 999 (9th Cir. 1984). In that case, the administrator of an employee benefit plan brought an action against an employer for its unpaid contributions and against the surety on the employer's state contractor license bond. The plaintiff administrator had a basis for federal jurisdiction against the employer in Section 502 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132. However, the suit against the surety was brought under California Business and Professions Code, Section 7071.5, the provision of California state law to protect those damaged by actions of contractors.

The district court dismissed the suit against the defendant (surety) and the plaintiff (administrator) appealed. The Ninth Circuit affirmed the dismissal saying:

> Plaintiff contends that the district court should have exercised pendent jurisdiction over the claim

against the surety. In refusing to exercise pendent party jurisdiction, however, the district court was applying a long line of cases of this circuit. They hold that under a theory of pendent jurisdiction, a state claim against a defendant may be added to a pending claim over which the court already has jurisdiction, but that pendent jurisdiction does not permit a new party to be added to a case absent an indepndent jurisdictional basis. *Safeco Insurance Co. v. Guyton,* 692 F.2d, 551, 555-56 (9th Cir. 1982); *Munoz v. Small Business Administration,* 644 F.2d 1361, 1365-66 (9th Cir. 1981); *Ayala v. United States,* 550 F.2d 1196, 1197 (9th Cir. 1977), *cert. dismissed,* 435 U.S. 982, 98 S.Ct. 1635, 56 L.Ed.2d 76 (1978); *Hymer v. Chai,* 407 F.2d 136, 137-38 (9th Cir. 1969); *Williams v. United States,* 405 F.2d 951, 954 (9th Cir. 1969).

Id. at 1000.

The applicable authority is clear that pendent party jurisdiction is not recognized in the Ninth Circuit. Unless and until the United States Supreme Court or an *en banc* panel of the Ninth Circuit changes the law established in the "long line of cases in this circuit" referred to by the court in *Carpenters Southern California Administrative Corporation,* this court cannot take jurisdiction over claims against parties for which there is no independent basis for federal jurisdiction.

III

CONCLUSION

For all of the foregoing reasons, the defendant, United States of America, submits that the court must deny the plaintiff's motion to amend the complaint.

DATED: March 20, 1987

PETER K. NUNEZ
United States Attorney
/s/ Michael E. Quinton
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BARBARA FINLEY, individually, and as Personal Representative of the Estates of ROBERT FINLEY, ROBIN FINLEY, RENEE FINLEY, and SCOTT FINLEY, deceased,	) CIVIL ACTION) NO. 86-1151-S(M)
Plaintiff,	) PLAINTIFF'S REPLY TO UNITED STATES' OPPOSITION TO MOTION TO AMEND PLAINTIFF'S COMPLAINT
vs.	
UNITED STATES OF AMERICA,	
Defendant.	) (Filed March 25, 1987)

The United States has added nothing of significance to consideration of the grounds for the assumption of pendent jurisdiction by this court over the state court defendants. The United States tirelessly asserts *Ayala v. United States,* 550 F.2d 1196 (9th Cir. 1977) *cert. dismissed per stip.,* 435 U.S. 982, which was called to the attention of the court in the plaintiff's opening papers. The United States makes no effort, however, to respond to the clear distinctions between *Ayala,* and this case.

As has been noted by the United States Supreme Court, questions and determinations regarding pendent jurisdiction are "subtle and complex" *Aldinger v. Howard,* 427 U.E. 1, 2 (1976). The United States calls this Court's attention to *Aldinger* but fails to provide the total essence of the Supreme Court's logic. (Defendant's Memorandum of Points & Authorities, P. 7). To appreciate *Aldinger's* logic as applied to the instant case, one must look at the court's complete comment as follows:

> Other statutory grants and other alignments of parties and claims might call for a different result. When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. § 1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only* in a federal court may all of the claims be tried together ....
>
> *Aldinger,* at 18 (emphasis in original).

The court points out that different considerations must be applied in a FTCA case where *exclusive* jurisdiction is granted to the federal court. As pointed out by the United States at the end of its lengthy quotation from *Aldinger* (Defendant's Memorandum pp. 6-7) federal courts should consider the availability of a state court remedy to the plaintiffs. That very point distinguishes the problem facing plaintiff in the case at bar from *Aldinger.* Plaintiff cannot command all defendants to

appear before one court unless it's federal court because by statute the federal court is the only forum for FTCA litigation. The discretionary exercise of pendent party jurisdiction in this situation does not arise exclusively from a call for convenience and fairness. It arises also from a desire for judicial economy. Clearly, plaintiff's claims are "such that he would ordinarily be expected to try them all in one judicial proceeding . . . ." *United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966). Further, since plaintiff's claims arise out of a common nucleus of operative facts, except for their disparate federal and state character, one would expect to try them together. *Owen Equipment & Erection Co. v. Kruger,* 437 U.S. 365, 371-72 (1978); *Ortiz v. United States,* 595 F.2d 65, 69-70 (1st Cir. 1979).

It appears that the subtlety and complexity of the differences between *Ayala* and this case have been lost on the United States. As noted in plaintiff's original moving papers, this case involves allegations of identical and or similar operational negligence against a variety of operational actors, all of which acted together to cause plaintiff's injuries. There are no allegations in plaintiff's complaint of a product defect which, when combined with the negligence of a different actor-defendant, cause an injury. This case is much like the case where a person injured in a traffic accident sues both the driver and the driver's employer, or the case in which a patient sues a doctor, a nurse, and a hospital. In such cases, as here, a plaintiff would ordinarily expect that all of the claims against all of the defendants which arise from the same nucleus of operative facts would be tried and determined in one judicial proceeding.

The case of *Stewart v. U.S.,* 716 F.2d 755 (10th Cir. 1982), *cert. den.* 469 U.S. 1018 (1983) discusses with clarity and precision the subtlties and complexities referred to by the Supreme Court in *Aldinger.* The 10th Circuit found that Congress had not disapproved the use of pendent party jurisdiction in conjunction with the Federal Tort Claims Act. The court further found, citing *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966), that Article III of the Constitution permits the exercise of pendent party jurisdiction where the expectation of a single judicial proceeding involving claims against multiple defendants arising from a common nucleus of operative facts was reasonable.

A simplistic and uncritical reading of *Stewart* might suggest that it is in total disagreement with *Ayala.* To the contrary, *Stewart* is distinct from and different than *Ayala,* in the same way that this case is distinct from and different than *Ayala.* We cannot ask or predict how the 10th Circuit would decide *Ayala,* and we cannot ask or predict how the 9th Circuit would decide *Stewart.* We can, however, urge this court to foster the values of judicial efficiency and economy by asserting pendent party jurisdiction over San Diego Gas & Electric and the City of San Diego, so that all claims, including third party claims, cross claims, and counter claims, arising by, amongst and between the various parties that were allegedly involved in this tragedy can be resolved in one proceeding.

In a similar action to the case at Bar, the Eleventh Circuit urged the exercise of pendent party jurisdiction. *Lykins v. Pointer Incorporated,* 725 F.2d 645 (11th Cir.

1984). As is the instant case, *Lykins* is a wrongful death action which resulted from an aircraft accident. The *Lykins* court found no express or implied negation of the federal district court's power to hear pendent party claims in 28 U.S.C. § 1346(b) which granted federal jurisdiction over plaintiff's tort claims against the United States, *Lykins*, at 647. The court went on to distinguish *Aldinger* and its limitations as not being applicable in an FTCA action. The *Lykins* court held that in an action against the government under the FTCA with associated actions against private non-diverse defendants, where each is charged with some role in causing an aircraft accident, "there are no constitutional or statutory barriers to the exercise of pendent party jurisdiction beyond the normal requirements of *Gibbs* when jurisdiction is conferred by 28 U.S.C. § 1346(b)." *Lykins*, at 649.

The Ninth Circuit in another aircraft accident case which was decided two years after *Ayala* indicated that pendent party jurisdiction may be proper under certain circumstances. *See,* Note 2, *Mattschei v. United States,* 600 F.2d 205, 207 (9th Cir. 1979)

It would be patently unjust to require plaintiff to resurrect her state court actions, which have been dismissed pending this court's exercise of pendent jurisdiction, and force her to endure two trials on the same or similar issues. Judicial economy, fairness to litigants, common sense, and justice demand the consolidation of these actions before one forum through the valid exercise of pendent party jurisdiction.

DATED: March 24, 1987

SPEISER, KRAUSE & MADOLE
By: /s/ Joseph T. Cook
JOSEPH T. COOK
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DATED: March ....., 1987

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BARBARA FINLEY, individually, and as Personal Representative of the Estates of ROBERT FINLEY, ROBIN FINLEY, RENEE FINLEY, and SCOTT FINLEY, deceased,	)	CIVIL ACTION NO. 86-1151-S(M)
Plaintiff,	)	FIRST AMENDED COMPLAINT FOR WRONGFUL DEATH AND PERSONAL INJURY; DEMAND FOR JURY TRIAL
vs.	)	
UNITED STATES OF AMERICA, CITY OF SAN DIEGO, and SAN DIEGO GAS & ELECTRIC COMPANY,	)	
Defendants.	)	

BARBARA FINLEY, individually and as Personal Representative of the Estates of ROBERT FINLEY, ROBIN FINLEY, RENEE FINLEY and SCOTT FIN-

LEY, by and through her attorneys, Hillyer & Irwin and Speiser, Krause & Madole, for her First Amended Complaint alleges as follows:

THE PARTIES

1. BARBARA FINLEY is a resident of the county of San Diego, the widow of ROBERT FINLEY, deceased, and the mother of ROBIN FINLEY, deceased, RENEE FINLEY, deceased, and SCOTT FINLEY, deceased.

2. BARBARA FINLEY is the Personal Representative of the Estates of ROBERT FINLEY, ROBIN FINLEY, RENEE FINLEY, and SCOTT FINLEY.

3. The UNITED STATES OF AMERICA, by and through its administrative agency ,the Federal Aviation Administration (hereafter the FAA), operates and maintains navigational and operational facilities at Montgomery Field, an airport within the county of San Diego. The Montgomery Field instrument approach lighting system for Runway 28 right at Montgomery Field is included amongst those facilities operated and maintained by the FAA. Additionally, the FAA operates a radar approach control located at Miramar Naval Air Station within the county of San Diego, for the purpose (amongst others) of providing radar control of aircraft making instrument approaches to Runway 28 right at Montgomery Field.

4. The CITY OF SAN DIEGO (hereinafter CITY) is a political entity within the state of California. On February 16, 1984, an administrative claim was presented to the CITY for the damages set forth in this first amended complaint, and on August 2, 1984 that administrative claim was denied by the CITY. The CITY owns

and operates an airport and landing field known as Montgomery Field within the county of San Diego, and as such is responsible for the maintenance and operation of facilities at the airport, including approach lighting systems.

5. SAN DIEGO GAS & ELECTRIC COMPANY (hereinafter SDG&E) is a public utility corporation incorporated under and by virtue of the laws of the state of California, with its principal place of business within the county of San Diego, state of California. SDG&E is responsible for the installation and maintenance of electric transmission lines and supporting poles and towers ienluding electric transmission lines, poles and towers running north-south approximately 900 feet of Santo Road, perpendicular to the ILS approach course to Runway 28 right for Montgomery Field.

JURISDICTION

6. This Court has jurisdiction over the UNITED STATES OF AMERICA in this matter by virtue of the provisions of 28 U.S.C. Section 1346(b) and 28 U.S.C. Section 2674 et seq.

7. Pursuant to 28 U.S.C. Section 2675, plaintiff herein has submitted an administrative claim to the FAA. In an undated letter, received by plaintiff's counsel on November 18, 1985, plaintiff's claim was denied.

8. Plaintiff requests this Court to assume pendent claim jurisdiction over defendants the CITY and SDG&E. The claims set forth in the complaint against the UNITED STATES, the CITY and SDG&E are based on the same operative facts, and as a matter of convenience and fair-

ness to the parties, this Court should assume and exercise jurisdiction over the claims against the CITY and SDG&E, inasmuch as this is the only court that has jurisdiction over the defendant the UNITED STATES.

9. Pursuant to 28 U.S.C. Section 1402(b), venue in this district is proper inasmuch as the acts or omissions complained of occurred within this district.

THE ACCIDENT

10. On November 11, 1983, Beechcraft Baron N911SC, while operating on an instrument flight rules flight plan in instrument meteorological condition commenced an instrument landing system (hereafter ILS) approach to Runway 28 right at Montgomery Field, at or about 10:21 p.m. PST. At the time the ILS approach was commenced, the plane was being piloted by Tom Lessard, and has passengers were ROBERT FINLEY, ROBIN FINLEY and RENEE FINLEY, all deceased. At all times relevant, Tom Lessard was a fully qualified and duly licensed pilot, authorized by the Federal Aviation Administration (hereafter FAA) to act as pilot-in-command of N911SC and to execute ILS approaches during instrument meteorological conditions.

11. At approximately 10:24 p.m., N911SC executed a missed ILS approach, or go-around, because the approach and runway lights at Montgomery Field were not visible. At that point, N911SC was authorized by FAA radar controllers to attempt a second ILS approach to the same runway.

12. During the second approach, at about 10:30 p.m., N911SC struck an SDG&E electric transmission line, ap-

proximately 900 feet east of Santo Road, San Diego. As a result of contacting the SDG&E transmission line, the plane descended, impacted the ground, and burst into flames and was destroyed by fire.

13. After N911SC had impacted the ground and come to rest, all four occupants, including plaintiff's decedents herein, were seen by witnesses to be alive and attempting to extricate themselves. Tom Lessard and RENEE FINLEY were either thrown from the wreckage during the impact sequence, or crawled free. They were alive, removed by ambulance to hospitals and treated for burns. ROBERT FINLEY and ROBIN FINLEY although seen by witnesses to be alive in the wreckage, were unable to egress from the flames, and were burned to death.

14. Tom Lessard survived approximately 24 hours, and then died from his burns. RENEE FINLEY, plaintiff's decedent herein, survived 13 days before succumbing to her burns.

FIRST CAUSE ACTION

(NEGLIGENCE OF THE UNITED STATES)

15. Plaintiff repeats, realleges and incorporates by reference paragraphs 1 through 14 as though fully set forth herein.

16. At all times revelant, the FAA, as the operator and maintainer of navigational facilities at Montgomery Field, including the instrument approach lighting system utilized for Runway 28 right, held itself out as knowledgeable and competent to operate and maintain that system. The FAA knew, or in the exercise of reasonable care

ought to have known, that the high intensity approach ligting system for Runway 28 right was relied upon and used by pilots for the purpose of acquiring visual contact with the airport and runway landing area, and in particular, during times when fog, rain and clouds reduced visibility in the area of the airport.

17. The FAA knew, or in the exercise of reasonable care ought to have known, that when the high intensity approach lighting system serving Runway 28 right at Montgomery Field was inoperative, it could provide notice to pilots using the airport by use of an advisory system called "Notice to Airmen" (NOTAMS).

18. By virtue of the foregoing, the FAA had a duty to operate and maintain the high intensity approach lighting system serving Runway 28 right at Montgomery Field in an operable condition, including operation during hours when the airport traffic control tower was not operating and/or to provide notice to pilots relying upon said system when it was out of service.

19. On the night of November 11, 1983, during the time when N911SC was attempting both of its ILS approaches, the high intensity approach lighting system for Runway 28 right at Montgomery Field was inoperative, and the FAA did not issue or cause to be issued any NOTAM or any other warning of the failure of the high intensity approach lighting system, all in breach of the FAA's duties to pilots relying upon the system.

20. As a direct and proximate result of the FAA's breach of duty, as set forth above, N911SC crashed killing plaintiff's decedents, ROBERT FINLEY, ROBIN FIN-

LEY and RENEE FINLEY, and plaintiff has been damaged as more fully set forth below in paragraphs 44 through 49, which are incorporated herein by reference.

SECOND CAUSE OF ACTION

(NEGLIGENCE OF THE UNITED STATES)

21. Plaintiff repeats, realleges and incorporates by reference paragraphs 1 through 14 as though fully set forth herein.

22. At all times relevant, the FAA held itself out through its San Diego approach control facility as a provider of air traffic control services for aircraft making instrument approaches to Montgomery Field. The FAA knew, or in the exercise of reasonable care ought to have known, that pilots executing instrument approaches at Montgomery Field rely upon FAA controllers for advice and warning with regard to position, heading and altitude. FAA air traffic controllers at the San Diego approach control facility at Miramar Naval Air Station have available to them as part of their radar capability, a low altitude alert warning system. By virtue of the foregoing, the FAA had a duty to utilize its low altitude alert warning system, and to advise pilot of the activation and actuation of that system.

23. On the night of November 11, 1983, during the time that N911SC was attempting both of its ILS approaches, the low altitude alert warning system on the radar set utilized to provide air traffic control services to N911SC was not activated by its operators, and no low altitude warning was provided to the pilot of that aircraft during either approach, all in breach of the FAA's duty.

24. As a direct and proximate result of the FAA's breach of duty, as set forth above, N911SC crashed, killing plaintiff's decedents, ROBERT FINLEY, ROBIN FINLEY, and RENEE FINLEY, and plaintiff has been damaged as more fully set forth below in paragraphs 44 through 49, which are incorporated herein by reference.

THIRD CAUSE OF ACTION

(NEGLIGENCE OF THE CITY OF SAN DIEGO)

25. Plaintiff repeats, realleges and incorporates by reference paragraphs 1 through 14 as though fully set forth herein.

26. At all times relevant, the CITY, as the owner and operator of Montgomery Field, held itself out as knowledgeable and competent to operate and maintain an airport and landing field, including all of the various facilities necessary for aircraft operations into and out of such a field. In particular, the CITY held itself out as knowledgeable and competent in the operation and maintenance of instrument approach lighting systems, including a high intensity approach lighting system for Runway 28 right. The CITY knew, or in the exercise of reasonable care ought to have known, that the high intensity approach lighting system for Runway 28 right was relied upon and used by pilots for the purpose of acquiring visual contact with the airport and runway landing area, and in particular during times when fog, rain and clouds reduced visibility in the area of the airport.

26. The CITY advertised its airport or permitted its airport to be advertised in a variety of publications known to be used by pilots, including advice to pilots that

the high intensity approach lighting system for Runway 28 right was available twenty-four (24) hours a day, and that it could be activated by pilots during hours when the airport control tower was not in operation.

27. The CITY knew, or in the exercise of reasonable care ought to have known, that when the high intensity approach lighting system serving Runway 28 right at the airport was inoperative, it could provide notice to pilots using the airport, through the FAA, by use of an advisory system called Notice to Airmen (NOTAMS).

28. By virtue of the foregoing, the CITY had a duty to operate and maintain the high intensity approach lighting system serving Runway 28 right at the airport in an operable condition, including operation by pilots during hours when the airport traffic control tower was not operating and/or to provide notice to pilots relying upon said system when it was out of service. This duty was non-delegable.

29. On the night of November 11, 1983, during the time that N911SC was attempting both of its ILS approaches, the high intensity approach light system for Runway 28 right at Montgomery Field was inoperative, and the CITY did not issue or cause to be issued any NOTAM or any other warning of the failure of the high intensity approach lighting system, all in breach of the CITY's duties to pilots relying upon the system.

30. As a direct and proximate result of the CITY's breach of duty, as set forth above, N911SC crashed killing plaintiff's decedents, ROBERT FINLEY, ROBIN FINLEY and RENEE FINLEY, and plaintiff has been damaged as more fully set forth in paragraphs 44 through 49, which are incorporated herein by reference.

FOURTH CAUSE OF ACTION

(NEGLIGENCE OF SAN DIEGO GAS & ELECTRIC)

31. Plaintiff repeats, realleges and incorporates by reference paragraphs 1 through 14 as though fully set forth herein.

32. At all times relevant, SDG&E held itself out as a public power and light company, with special knowledge and expertise in the field of erecting and maintaining electric transmission wires and support poles and towers, including providing protective and warning devices intended to prevent the transmission lines, poles and towers from causing harm to others.

33. At all times relevant SDG&E knew, or in the exercise of reasonable care ought to have known that the electric transmission lines suspended between poles approximately 900 feet east of Santo Road, were less than two nautical miles from the eastern end of Runway 28 right at Montgomery Field, and that those transmission lines intersected the extended center line of Runway 28 right, as well as the ILS approach course for Runway 28 right.

34. SDG&E knew, or in the exercise of reasonable care ought to have known, that during hours of darkness, absent any lighting or warning system, electric transmission lines and their supporting poles and towers would not be visible to pilots flying in the vicinity of those lines and poles.

35. SDG&E knew, or in the exercise of reasonable care ought to have known, that it was foreseeable that a low flying airplane on approach to Runway 28 right at Montgomery Field might, through inadvertence or neglect, descend to the altitude of the electric transmission lines suspended some 900 feet east of Santo Road.

36. SDG&E knew, or in the exercise of reasonable care ought to have known, that simple flashing lights were available for attachment to towers and poles such as the towers supporting the wires struck by N911SC for very little initial expense, and minimal maintenance and operational cost.

37. By reason of the foregoing, SDG&E had a duty to provide inexpensive warning lights of the kind described, or similar, for the purpose of warning pilots who, during the hours of darkness, through inadvertence or neglect, descended to the altitude of the transmission lines while on approach to Runway 28 right at Montgomery Field.

38. SDG&E provided no lights to any of the towers in the vicinity of the extended center line of Runway 28 right near Santo Road, and therefore breached its duty to the foreseeable users of the airport, including the pilot of N911SC, and his passengers, ROBERT FINLEY, ROBIN FINLEY, and RENEE FINLEY, plaintiff's decedents herein.

39. As a direct and proximate result of SDG&E's breach of duty, set forth above, N911SC crashed, killing plaintiff's decedents, ROBERT FINLEY, ROBIN FINLEY, and RENEE FINLEY, and plaintiff has been damaged as more fully set forth below in paragraphs 44 through 49 and 50 and 51, which are incorporated herein by reference.

FIFTH CAUSE OF ACTION

(REPAIR AND RECOVERY OF MEDICAL EXPENSES BY RENEE FINLEY'S ESTATE)

40. Plaintiff repeats, realleges and incorporates by reference paragraphs 1 through 39, as though fully set forth herein.

41. As a direct and proximate result negligent conduct of the UNITED STATES, the CITY, and SDG&E, RENEE FINLEY, suffered severe burns and other injuries in the crash.

42. As a result of her burns and injuries, RENEE FINLEY received medical care and treatment from a variety of medical care providers until the time of her death from those injuries.

43. Following her death, RENEE FINLEY's estate became responsible to pay for the medical care rendered to RENEE FINLEY, as more fully set forth below in paragraph 49, which is incorporated herein by reference.

DAMAGES

44. By virtue of the death of ROBERT FINLEY, BARBARA FINLEY has suffered and will continue to suffer loss in the nature of lost support and services. In addition, she has suffered and will contiute to suffer the loss of love, care, affection, comfort and society previously provided to her by ROBERT FINLEY.

45. By virtue of the death of ROBIN FINLEY, BARBARA FINLEY, will suffer future loss of support and services, and she has suffered and will continue to suffer the loss of ROBIN FINLEY's love, affection, care, comfort and society.

46. By virtue of the death of RENEE FINLEY, BARBARA FINLEY will suffer future loss of support and services, and she has suffered and will continue to suffer the loss of RENEE's love, affection, care, comfort and society.

47. Between the time of his father's death on November 11, 1983, and his own death on July 26, 1985, SCOTT FINLEY suffered loss of support and services from his father, as well as the loss of love, affection, care, comfort, society, nurture, training and advice.

48. In addition to the damages as set forth above, BARBARA FINLEY became responsible to pay and did pay on behalf of the estates of ROBERT FINLEY, ROBIN FINLEY, and RENEE FINLEY, burial and funeral expenses.

49. On behalf of the state of RENEE FINLEY, the personal representative of the estate of RENEE FINLEY became responsible to pay medical expenses for the treatment and care of RENEE FINLEY between the time of crash on November 11, 1983, and her death on November 24, 1983.

PUNITIVE DAMAGES

50. Following the crash which was caused by several activities of the SDG&E, previously set forth, ROBERT FINLEY, ROBIN FINLEY and RENEE FINLEY all

survived and suffered personal injury and property damage prior to their deaths. ROBERT FINLEY and ROBIN FINLEY survived an estimated five (5) minutes, and RENEE FINLEY survived thirteen (13) days. Prior to their deaths, all three suffered and experienced impact and burn damages to their personal property, including clothes, jewelry and luggage.

51. Defendant SDG&E acted with a conscious disregard for the safety and well being of others, amounting to oppression, fraud and malice. SDG&E, acting by and through its employees including officers, directors and managing agents of the corporation has specific and direct knowledge of the hazards created by the power poles and power lines in advance of the accident and with conscious disregard for safety of those employees, including officers, directors and managing agents authorized and ratified both the placement of the hazard and the failure to protect or warn those who would foreseeably be harmed.

PRAYER

1. WHEREFORE, BARBARA FINLEY, individually, seeks recovery from the defendants UNITED to protect or warn those who would foreseeably be harmed. STATES OF AMERICA, CITY OF SAN DIEGO, and SAN DIEGO GAS & ELECTRIC COMPANY as follows:

A. Damages for the past and future loss of support and services previously provided by her husband, ROBERT FINLEY, in the amount of $1,000,000;

B. Damages for the past and future loss of love, affection, care, comfort and society previously pro-

vided her by her husband, ROBERT FINLEY, in the amount of $1,000,000;

C. Damages for the future loss of support and services to be provided by her daughter, ROBIN FINLEY, in the amount of $100,000;

D. Damages for the past and future loss of love, affection, care, comfort, and society previously provided by ROBIN FINLEY, in the amount of $100,000;

E. Damages for the future loss of support and services to be provided by her daughter, RENEE FINLEY, in the amount of $300,000; and

F. Damages for the past and future loss of love, affection, care, comfort and society previously provided by RENEE FINLEY, in the amount of $300,000.

2. WHEREFORE, plaintiff, BARBARA FINLEY, as personal representative of the estate of SCOTT FINLEY, seeks recovery from defendant UNITED STATES OF AMERICA, CITY OF SAN DIEGO, SAN DIEGO GAS & ELECTRIC COMPANY as follows:

A. Damages for the loss of support and services previously provided by his father, ROBERT FINLEY, which were lost between the time of his father's death and SCOTT FINLEY's death in the amount of $100,000; and

B. Damages for loss of love, affection, care, comfort, society, guidance, training and nurture previously provided by his father, ROBERT FINLEY, which were lost between the time of his father's death and SCOTT FINLEY's death, in the amount of $500,000.

3. WHEREFORE, plaintiff BARBARA FINLEY, as personal representative of the estate of ROBERT FINLEY, seeks recovery from defendant UNITED STATES OF AMERICA, CITY OF SAN DIEGO, SAN DIEGO GAS & ELECTRIC COMPANY as follows:

A. Damages for the funeral and burial expenses for ROBERT FINLEY, according to proof; and

B. Damages for damaged and destroyed personal property, according to proof.

4. WHEREFORE, plaintiff, BARBARA FINLEY, as personal representative of the estate of ROBIN FINLEY, seeks recovery from defendants UNITED STATES OF AMERICA, CITY OF SAN DIEGO, SAN DIEGO GAS & ELECTRIC COMPANY as follows:

A. Damages for the funeral and burial expenses for ROBIN FINLEY, according to proof; and

B. Damages for damaged and destroyed personal property, according to proof.

5. WHEREFORE, plaintiff, BARBARA FINLEY, as personal representative of the estate of RENEE FINLEY, seeks recovery from defendants UNITED STATES OF AMERICA, CITY OF SAN DIEGO, SAN DIEGO GAS & ELECTRIC COMPANY as follows:

A. Medical expenses paid for the medical care and treatment of RENEE FINLEY, according to proof;

B. Damages for the funeral and burial expenses for RENEE FINLEY, according to proof; and

C. Damages for damaged and destroyed personal property, according to proof.

6. WHEREFORE, plaintiff BARBARA FINLEY, as personal representative of the estates of ROBERT FINLEY and ROBIN FINLEY seeks recovery from defendant SAN DIEGO GAS & ELECTRIC COMPANY for punitive damages in the amount of $10,000,000.

7. Plaintiff prays for such other further and different relief as the Court may deem just and proper.

DATED: February 18, 1987

SPEISER, KRAUSE & MADOLE
By: /s/ Joseph T. Cook
JOSEPH T. COOK

DATED: February —, 1987

HILLYER & IRWIN
By: .....
HOWARD A. ALLEN
Attorneys for Plaintiff,
BARBARA FINLEY

JURY DEMAND

Plaintiff, BARBARA FINLEY, by and through her attorneys, demands a trial by jury.

DATED: February 18, 1987

SPEISER, KRAUSE & MADOLE
By /s/ Joseph T. Cook
JOSEPH T. COOK

DATED: February —, 1987

HILLYER & IRWIN
By .....
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BARBARA FINLEY

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
NOV 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1973

In The
Supreme Court of the United States
October Term, 1988

BARBARA FINLEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether it is error for the Circuit Court of Appeals to reverse and dismiss pendent-parties for lack of jurisdiction, in a case which includes exclusive federal jurisdiction over the United States of America as defendant, after a District Court has exercised discretion and invoked pendent-party jurisdiction over parties not subject to independent federal jurisdiction.

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CASES

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Ausland v. United States, 488 F. Supp. 426 (D.C. S.D. 1980) 23, 24

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Baltimore Steamship Co. v. Phillips, 274 U.S. 316 (1927) 9

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Connecticut General Life Insurance Co. v. Craton, 405 F.2d 41 (5th Cir. 1968) 20

Dick Meyers Towing Service, Inc. v. United States, 577 F.2d 1023 (5th Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) 19, 20

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No. 87-1973

—o—

In The

Supreme Court of the United States

October Term, 1988

—o—

BARBARA FINLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

BRIEF FOR PETITIONER

—o—

OPINIONS BELOW

The Opinion and Order of the United States District Court for the Southern District of California, dated April 16, 1987, is unreported, and is contained in Appendix A to the Petition for Writ of Certiorari at pp. A-5 to A-10. The Order of the United States Court of Appeals for the Ninth Circuit, dated March 4, 1988, is unreported and is reprinted in Appendix A to the Petition for Writ of Certiorari at page A-1.

JURISDICTION

Exclusive jurisdiction was conferred in the United States District Court for the Southern District of California, pursuant to the Federal Tort Claims Act, 28 U.S.C. section 1346(b), and sections 2671-2680, in that the United States is a party defendant to this wrongful death action and plaintiff resides in and the acts and/or omissions of negligence allegedly occurred in the Southern District of California.

The district court certified its Order of April 16, 1987 pursuant to 28 U.S.C. section 1292(b) for immediate interlocutory appeal (Pet. Cert. A-9) and the Ninth Circuit granted the defendant United States of America's petition for permission to appeal on July 7, 1987. (Pet. Cert. A-3).

Jurisdiction is proper in this Court pursuant to 28 U.S.C. section 1254(1), and the granting of plaintiff's Petition for Writ of Certiorari on October 3, 1988. (J.A. 3).

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PROVISIONS OF LAW INVOLVED

The text of the constitutional provisions and statutes relevant to the determination of the present case are set forth in Appendix A to this Brief; to wit, United States Constitution Article III section 2, and the Federal Tort Claims Act, 28 U.S.C. sections 1346(b) and 2671-2680.

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STATEMENT OF CASE

This is a simple tort case. Plaintiff's decedents were killed in an aircraft accident and plaintiff seeks recovery for their wrongful deaths. In this case, like many aircraft accident cases, the plaintiff has alleged that a number of factors combined to cause the crash and that several defendants are jointly and severally liable. Plaintiff sued the United States of America, alleging negligent operation of runway lighting and negligent air traffic control; the City of San Diego Department of Airports, alleging negligent operation of runway lighting; and, the San Diego Gas & Electric Company alleging negligent placement of and failure to adequately mark electric transmission lines.

The Federal Tort Claims Act, 28 U.S.C. § 1346(b) (FTCA) compels plaintiff to pursue her claims exclusively in federal court. There is no independent basis for federal jurisdiction over San Diego Gas & Electric or the City of San Diego. No federal question is presented and the parties are not diverse.

After bringing suit against the United States in the Southern District of California, plaintiff moved to amend her complaint in order to add San Diego Gas & Electric Company and the City of San Diego.[1] The proposed amended complaint invoked pendent-party jurisdiction over the newly added parties. The United States of Amer-

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[1]The City of San Diego and San Diego Gas & Electric Company had previously been sued in state court. That action was dismissed by stipulation and without prejudice in order to maintain the entire action in federal court. *Finley v. San Diego Gas & Electric, et al.*, California Superior Court, County of San Diego, Case No. 528516.

ica opposed the motion to amend, citing *Ayala v. United States*, 550 F.2d 1196 (9th Cir. 1977), *cert. granted*, 434 U.S. 814 (1977), *cert. dismissed per stip.*, 435 U.S. 982 (1978).[2]

The district court held that since the litigation arose from a common nucleus of operative facts, judicial economy, efficiency and fairness mandated that the case be resolved in one forum. The only available single forum was the United States District Court because the FTCA was involved. The district court granted plaintiff's motion to amend, acknowledged the propriety of pendent-party jurisdiction in FTCA cases such as the one at bar, and certified the question to the Ninth Circuit Court of Appeal. (Pet. Cert. A-5-10). The Ninth Circuit summarily reversed citing *Ayala* without considering whether the district court abused its discretion, or discussing the district court's analysis of the factors enumerated in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), and *Aldinger v. Howard*, 427 U.S. 1 (1976), *rev'd on other grounds, Monell v. New York Department of Social Services*, 436 U.S. 658 (1978). (Pet. Cert. A-1).

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[2]The parties that petitioner seeks to add through pendent-party jurisdiction agree that a single trial in the federal forum would be best for all concerned and do not oppose the exercise of pendent-party jurisdiction over them. Both have asserted indemnity claims against the United States in federal court. *City of San Diego v. USA*, Civil No. 87-187-S (SD CA) and *San Diego Gas & Electric Company v. USA*, Civil No. 86-2017-S (SD CA).

SUMMARY OF ARGUMENT

Article III of the Constitution provides Congress with the authority to establish the federal court system and the laws of the land. Congress has enacted certain jurisdictional statutes, but has remained silent on the issue of pendent jurisdiction. Through a long series of cases, this Court has established the yardstick by which district courts measure cases before determining whether it is permissible to exercise discretion and assume pendent jurisdiction, which may be asserted when claims arise under the laws of the United States (unless Congress has specifically precluded federal jurisdiction); contain a substantial federal issue; and comprise but one constitutional case sharing a common nucleus of operative facts which would normally be tied together in one proceeding.

A majority of federal courts have affirmatively exercised their power to assume pendent jurisdiction over non-federal tort claims against third parties not subject to independent federal jurisdiction. The Ninth Circuit, on the other hand, has rigidly maintained that Art. III to the Constitution grants no such authority. A careful reading of Art. III, however, reveals no such constraint and federal case law supports pendent jurisdiction under certain circumstances. This Court has consistently expanded the application of pendent jurisdiction and emphasized the discretionary aspects of its application by lower courts.

Cases involving pendent-party questions have a wide variety of federal and non-federal plaintiff-defendant combinations. Therefore, it is proper that this Court should clarify that when a district court determines the facts of the case before it warrants the exercise of pendent-party

jurisdiction, in the interest of judicial economy and fairness to the litigants, that that discretionary decision is proper.

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ARGUMENT

I.

WHEN FEDERAL JURISDICTION IS MANDATED, THE DISTRICT COURT HAS THE POWER TO ACCEPT PENDENT JURISDICTION OVER NON-FEDERAL TORT CLAIMS AGAINST THIRD PARTIES NOT SUBJECT TO INDEPENDENT FEDERAL JURISDICTION

A prerequisite to a federal court's adjudication of a controversy is, of course, constitutional authority granting jurisdiction. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803). Article III of the United States Constitution creates a Supreme Court and authorizes Congress to create lower courts. *U.S. Const.* Art. III, section 1. Article III also gives the federal courts the power to adjudicate controversies arising under "the laws of the United States" and "to which the United States shall be a Party." *Id.*, section 2. In *Osborne v. Bank of the United States,* 22 U.S. (9 Wheat) 738 (1824), Chief Justice Marshall noted that the Constitution empowers a federal court to resolve state law questions which are naturally incident to the legitimate exercise of federal judicial power. Thus, "when a question to which the judicial powers of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." *Osborne,* 22 U.S. at 823. The Third Circuit has interpreted *Osborne* as holding: "that the Article III [jurisdictional] grant is broader than merely a grant over federal 'claims' but encompasses all claims in 'cases' arising under federal law." *Lentino v. Fringe Employee Plans, Inc.,* 611 F.2d 474, 478 (3rd Cir. 1979).

The apparent difficulty which exists at the district court level, and which is raised directly by this action, is determining the jurisdictional dimensions of a federal "case." The question has been especially troublesome in determining whether to invoke pendent jurisdiction, whether pendent claim or pendent-party jurisdiction. While this Court resolved the question of pendent claim jurisdiction in *United Mine Workers of America v. Gibbs,* 383 U.S. 715 (1966), the question of pendent-party jurisdiction, described as a "subtle and complex question with far reaching implications," [*Moor v. County of Alameda,* 411 U.S. 693, 715 (1973), *reh'g denied,* 412 U.S. 963 (1973)] has yet to be addressed directly by this Court.

A. The Doctrine Of Pendent Jurisdiction Is Firmly Established In American Jurisprudence.

Simply stated, the doctrine of pendent jurisdiction allows a federal court to entertain claims which do not have an independent jurisdictional basis if they arise from the common nucleus of operative facts of a claim over which the court possesses subject matter jurisdiction.

The doctrine of pendent jurisdiction is deeply rooted in American law, and has been consistently affirmed and expanded since the birth of its lineal ancestor in 1824, *Osborne v. Bank of the United States, supra. Osborne* ad-

dressed whether a federal court could assume jurisdiction over an action which presented questions, the answers to which were not dependent upon an interpretation of the Constitution or the laws of the United States. Chief Justice Marshall, speaking for the Court, stated: "[t]here is scarcely any case, every part of which depends upon the Constitution, laws or treaties of the United States." *Osborne*, 22 U.S. at 820. Thus, the need for broader jurisdiction to effectuate justice between the parties was acknowledged and this Court has continued to build upon the foundation laid in *Osborne*.

In *Siler v. Louisville and Nashville Railroad Co.*, 213 U.S. 175 (1909), this Court held that when a trial court was presented with mixed issues of federal and state law, it "had the right to decide all of the questions in a case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only." *Id.* at 191.

In *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926), a counter-claim arising out of the same transaction as the original case before the trial court had no independent jurisdictional basis. The *Moore* Court held that dismissal of the complaint did not deprive the federal court of the power to dispose of the counter-claim on the merits.

In *Hurn v. Oursler*, 289 U.S. 238 (1933), the Court held that where a party had a single cause of action which was based on both federal and non-federal grounds "the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case

upon the non-federal *ground.*" *Id.* at 246. (emphasis in original). The *Hurn* Court acknowledged the wisdom of *Siler, supra,* and *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316 (1927), wherein the rationale of pendent jurisdiction was stated as "to require a plaintiff to try his whole cause of action and his whole case at one time." *Id.*, at 320, quoting *United States v. California & Ore. Land Co.*, 192 U.S. 355 (1904).

The doctrine of pendent jurisdictian was further expanded in 1966 in *United Mine Workers of America v. Gibbs, supra,* as this Court found that the "limited approach" of *Hurn* was "unnecessarily grudging." *Gibbs*, 383 U.S. at 725. The *Gibbs* court laid the cornerstone of the modern doctrine of pendent jurisdiction by permitting the district court to entertain a state law claim, even though the related federal claim had not been proven.

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim 'arising under [the] Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority . . .,' U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case". The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103. The state and federal claims must arise from a common nucleus of operative facts. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power*

in the federal courts to hear the whole. (Emphasis in original; footnotes omitted).

Gibbs, 383 U.S. at 725.

Pendent jurisdiction has clearly been recognized and consistently expanded since Chief Justice Marshall first identified the legal basis, the practicality and the inherent justice of liberally construing jurisdiction of the federal courts. Justice Brennan, writing for the majority in *Gibbs*, recognized the need for expanded jurisdiction in certain circumstances to best effectuate the fundamental principals of judicial economy and substantial justice to the parties.

Those same reasons of economy and justice justify the application of pendent-party jurisdiction when other parties in a case, arising out of the same operative facts, must be sued in federal court and do not breach the limits set in *Gibbs*. Thus, ensuring a district court's power to assume pendent-party jurisdiction as a logical and rational application of the standards established in *Gibbs*.

B. The District Court Has Discretion To Accept Pendent-Party Jurisdiction Under Appropriate Circumstances.

Pendent-party jurisdiction was addressed by this Court in *Aldinger v. Howard*, 427 U.S. 1 (1976). In *Aldinger*, petitioner brought a civil rights action based on 42 U.S.C. section 1983 and on state laws against the county of Spokane and several of its employees. The lower court dismissed the action against the county on the grounds that pendent-party jurisdiction was not available to adjudicate petitioner's state law claims since an independent federal jurisdictional basis did not exist.

The *Aldinger* Court stated that since Congress had remained silent on pendent jurisdiction, the *Osborne* and *Gibbs* line of cases "left [the way] open for the Court to fashion its own rules under the general language of Art. III." *Aldinger*, 427 U.S. at 15. The *Aldinger* Court noted that while Article III power in pendent *claim* jurisdiction had been confirmed by *Gibbs*, the issue of pendent-party jurisdiction had not, as yet, been resolved. *Aldinger*, 427 U.S. at 9.

The question left unresolved by *Osborne* and *Gibbs* was whether by virtue of the statutory grant of subject matter jurisdiction "Congress had addressed itself to the *party* as to whom jurisdiction pendent to the principle claim is sought." *Id.*, at 16 (emphasis in original). The Court found that Congress had, in fact, addressed itself to the *party* to which jurisdiction pendent to the principle claim was sought in 28 U.S.C. section 1343 and 42 U.S.C. section 1983 by using the word "person" in section 1983, thus excluding governmental entities from jurisdiction. While attempting to avoid "any sweeping pronouncement" the Court set forth two "observations" which "suffice for the disposition" of this type of case. *Aldinger*, 427 U.S. at 18. A federal court must first satisfy itself not only that Art. III permits pendent-party jurisdiction, but also that Congress has not expressly or by implication negated its existence in the statutes conferring jurisdiction. *Id.*, at 18. *Aldinger* did not permit pendent-party jurisdiction because the second criteria could not be met since Congress had in fact negated suit against the county by its use of the term "person."

The *Aldinger* Court limited its holding to the specific statutes under which the claim was brought and noted

that the results might be different in a case, such as the instant case, brought under the Federal Tort Claims Act:

> Other statutory grants and other alignments of parties and claims might call for a different result. When the grant of jurisdiction to a Federal Court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. § 1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only* in a federal court may all the claims be tried together. (Emphasis in original, footnote omitted).

Aldinger, 427 U.S. at 18.

The instant case presents exactly the circumstances foreseen by the *Aldinger* Court. Petitioner's decedents were killed in one aircraft accident. (J.A. 7). Petitioner desires to gather all joint tortfeasors in one judicial proceeding. (J.A. 36). Jurisdiction against the United States of America is exclusive to federal court. The federal court is the *only* forum in which all parties can be tried together. (J.A. 32).

C. The Ninth Circuit Stands Alone In Its Antipathy To Pendent-Party Jurisdiction.

THE FIRST CIRCUIT

In *Bowers v. Moreno*, 520 F.2d 843 (1st Cir. 1975), the First Circuit approved the assumption of pendent-party jurisdiction over trustees of a union trust fund. In this federal question case, the court observed that the rationale for exercising pendent-party jurisdiction is most strong in cases in which federal jurisdiction is exclusive.

> Where the jurisdiction-conferring claim is a federal question over which state courts have concurrent jurisdiction—for example civil rights and general federal questions—fairness does not demand that both actions be brought in the federal forum, though judicial economy may. However, when the jurisdiction-conferring claim must be brought in the federal court, both claims may be heard in the same forum only if pendent jurisdiction is exercised. In these cases, the rationale favoring settlement of all issues in a single forum is most convincing. (footnotes and citations omitted).

Id., at 847.

In another federal question case brought under the Federal Deposit Insurance Act, the First Circuit held that the district court correctly asserted jurisdiction over the state law counter-claims. The court stated: "In the three years since *Aldinger* was decided, other courts have concluded, as we do, that the Supreme Court's cautious treatment of pendent jurisdiction does not preclude pendent party jurisdiction, whether it be called 'pendent' or 'ancillary,' in cases involving '[o]ther statutory grants and other alignments of parties . . .'" *Federal Deposit Insurance Corp. v. Otero*, 598 F.2d 627, 632 (1st Cir. 1979).

A district court within the First Circuit assumed pendent-party jurisdiction in an aircraft accident case similar to the case at bar. In *In Re N-500L Cases*, 502 F. Supp. 60 (D.C.P.R. 1979), the plaintiffs brought an action against the United States claiming jurisdiction under the Federal Tort Claims Act, and against other parties under diversity jurisdiction and federal statutes. The court held that it could assert pendent-party jurisdiction over those state claims which were pendent to the claim against the government brought under the FTCA:

> The dicta in *Aldinger*, the case law of the Circuit, the exclusive jurisdiction of the federal courts over ac-

> tions under the Federal Tort Claims Act and the statutory language of that Act all lead to the conclusion that this court, in the exercise of its discretion can use the Federal Tort Claims Act as an anchor for the exercise of pendent party jurisdiction over Defendant.

Id., at 63.

THE SECOND CIRCUIT

The Second Circuit upheld the exercise of pendent-party jurisdiction to join certain class members in a class action brought under the Securities Exchange Act and state fraud laws. In *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983), the court issued strong language supporting pendent-party jurisdiction in exclusive jurisdiction cases:

> The circumstances here are about as powerful for the exercise of pendent party jurisdiction as can be imagined. The exclusivity of federal jurisdiction over claims for violation of the Securities Exchange Act makes a federal court the only one where a complete disposition of federal and related state claims can be rendered.

Id., at 76.

The Second Circuit has not limited assumption of pendent-party jurisdiction solely to circumstances where claims arising out of the same incident must be brought in federal court against another defendant. In *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971), *on remand*, 346 F. Supp. 962 (E.D.N.Y. 1972), for example, the court held that a plaintiff in an admiralty action could assert a state claim against a defendant against whom no admiralty or other federal claim was asserted where there existed permissible federal admiralty jurisdiction over another defendant.

> Thus, we conclude that in a case such as this, where the facts underlying the state and federal claims are identical, a federal court vested with admiralty jurisdiction over a shipper's claim against the carrier for breach of contract of carriage does have the "power" also to entertain its state tort claim against the pier operator. (footnotes omitted).

Id., at 811.

The Eastern District of New York, has held that a plaintiff in a Federal Tort Claims Act case may name a non-federal joint tortfeasor in a single federal action. In the often cited case of *Hipp v. United States*, 313 F. Supp. 1152 (E.D.N.Y. 1970), the court wisely observed:

> The case of a joint tort-feasor made a defendant in a case under the Federal Tort Claims Act is peculiarly appropriate for application of the principal of 'the conservation of judicial energy and the avoidance of multiplicity of litigation' because the 'plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding.' If the cases were tried separately, each defendant would seek to cast the blame on the other and it would be possible for the plaintiff to recover nothing.

Id., at 1155, quoting *Gibbs*.

The *Hipp* court significantly found that pendent-party jurisdiction existed over the private joint-tortfeasor even before the government had filed a cross-claim against its co-defendant. The court discussed how the doctrine actually benefited the government in its efforts to seek contribution.

> In separate actions, if judgment in the federal court were granted against the United States alone, it might have to pay the entire damages instead of half, because

> of the New York rule that there is no contribution between joint-feasors unless there is a single judgment against both and one party has paid more than his share of the judgment. Since the United States cannot be sued in a state court, it could never enjoy the right of contribution except by having the private co-defendant sued in federal court.

Hipp, 313 F. Supp., at 1155.

In *Maltais v. United States*, 439 F. Supp. 540 (N.D. N.Y. 1977) plaintiffs sought to bring a wrongful death action under the Federal Tort Claims Act against the government and a corporate defendant against whom no other federal jurisdiction existed. In denying the corporation's motion to dismiss the pendent claims, the court stated:

> It is evident that the ultimate monetary liability of the United States cannot be determined with finality in a single lawsuit unless all the parties to this action are properly brought before this court.
>
> Thus, it can be seen that under the Federal Tort Claims Act pendent-party jurisdiction would not necessarily bring parties before a federal court that would not otherwise be subject to federal jurisdiction.

Id., at 548.

The court went on to state that: "to deny existence of pendent-party jurisdiction in an action brought under the Federal Tort Claims Act when no independent jurisdictional predicate exists would mean allowing a plaintiff limited entrance through the back door of a courthouse while maintaining a bolt on the front." *Maltais*, 439 F. Supp. at 548.

THE THIRD CIRCUIT

The Third Circuit has not yet squarely addressed the issue of pendent-party jurisdiction, but has acknowledged *Gibbs* and *Aldinger* in *Kerry Coal Co. v. United Mine Workers*, 637 F.2d 957 (3d Cir. 1981), *cert. denied*, 454 U.S. 823 (1981). However, several district courts within that Circuit have expressly held that pendent-party jurisdiction is appropriate in actions brought under the Federal Tort Claims Act.

In *Kline v. United States*, 587 F. Supp. 1386 (M.D. Pa. 1984), plaintiff brought a single action for negligent medical treatment against a veteran's hospital and several private physicians. The court denied the doctor's motion to dismiss for lack of subject matter jurisdiction.

> Faced as we are with the contrasting views of pendent party jurisdiction under the FTCA, we have not found an easy solution to the proper disposition of the present matter. Nevertheless, we believe that the course to follow in the current action is one that recognizes that pendent jurisdiction may be exercised in the current action and that it should be.

Id., at 1390.

In *Dumansky v. United States*, 486 F. Supp. 1078 (D.C. N.J. 1980), plaintiff brought a negligence action for injuries sustained on property owned by the United States against the government and four private defendants. On a motion for summary judgment by the government, the court raised the issue of pendent-party jurisdiction *sua sponte*. The court held:

> We are convinced that Congress has not expressly or impliedly negated the existence of pendent party

> jurisdiction under the FTCA . . . . If plaintiff is barred from suing the nonfederal defendants in the instant suit, he will be forced to pursue his claims in both federal and state forums. The FTCA's grant of jurisdiction, however, signals Congress's (sic) intent to determine the monetary liability of the United States in a single action.

Id., at 1088.

THE FOURTH CIRCUIT

The Fourth Circuit has not yet affirmed pendent-party jurisdiction. However, in *Johnson v. Town of Elizabethtown*, 800 F.2d 404 (4th Cir. 1986), a federal question case, the court discussed the *Gibbs/Aldinger* tests and the requirements which "must be satisfied for a proper exercise of pendent party jurisdiction." *Id.*, at 407 (disposition on other grounds).

Several district courts within the Fourth Circuit have exercised pendent-party jurisdiction in Federal Tort Claims Act cases. In *Santoni v. United States*, 450 F. Supp. 608 (D.C. Md. 1978), an action against government and private physicians, the court denied the government's motion to dismiss one of the plaintiffs for his failure to fail an administrative claim, by exercising *both plaintiff and defendant pendent-party jurisdiction.*

> Here the suit for the underlying personal injury can, as a practical matter, only be brought in the federal court, because only there can the U.S.A., one of the alleged tortfeasors, be sued under the Federal Tort Claims Act. That Congress intended tort claims against other defendants to be joined with tort claims against the U.S.A. growing out of the same accident may be inferred from the fact that the Act specifically provides for a *cross-claim* to be filed

> against the U.S.A. in such a case irrespective of the requirement of a prior administrative claim. (Citations omitted; emphasis in original).

Id., at 612.

In *Wood v. Standard Products Co., Inc.*, 456 F. Supp. 1098 (E.D. Va. 1978), plaintiff brought a negligence action against a ship owner under the Jones Act; against the United States under the FTCA; and against a private physician for negligent treatment of his injuries. The physician's motion to dismiss for lack of jurisdiction was denied because the FTCA and the Jones Act claims were sufficient "anchors" to exercise pendent-party jurisdiction over the state claim.

> In addition to the factual question being closely interwoven, this is a case where the plaintiff can only get full relief in the federal forum. This weighed heavily with the Court in *Aldinger* and thus weighs heavily with the Court here. The increase in efficiency, judicial economy and fairness to the plaintiff as well as to the defendants that results from one trial of the entire action leads the Court to believe that this is a case where its discretion should be exercised in favor of pendent-party jurisdiction . . . .

Id., at 1104.

THE FIFTH CIRCUIT

The Fifth Circuit has expressly stated that pendent-party jurisdiction may be asserted in Federal Tort Claims Act cases in their circuit. In *Dick Meyers Towing Service, Inc. v. United States*, 577 F.2d 1023 (5th Cir. 1978), *cert. denied*, 440 U.S. 908 (1979), when a failed lock closed traffic on a river, a tug boat operator sued the government who maintained the lock and the private party who constructed the lock. The court succinctly found that the

district court properly exercised pendent-party jurisdiction over the private party by stating: "Jurisdiction over the claim against the United States is based on 28 U.S.C. section 1346. Jurisdiction over the private parties was proper under the doctrine of 'pendent-party' jurisdiction recognized in this circuit. See *Florida East Coast Railway Co. v. United States*, 519 F.2d 1184, 1193-96 (5th Cir. 1975)." *Dick Meyers Towing*, at 1024 n.1.

In *Boudreaux v. Puckett*, 611 F.2d 1028 (5th Cir. 1980) the court held that a plaintiff may maintain a state claim against a surety along with its federal claim against a dealer under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. section 1981. The court held that under the facts of the case, plaintiffs satisfied the pendent-party elements recognized in the Fifth Circuit: "Consistent with the factors mentioned in *Aldinger*, Article III of the United States Constitution permits assertion of jurisdiction over [the] Surety. Also, the statutes Congress has enacted conferring jurisdiction have not expressly or by implication negated and assertion of jurisdiction over [the] Surety." *Id.*, at 1031. *See also, Connecticut General Life Insurance Co. v. Craton*, 405 F.2d 41 (5th Cir. 1968).

THE SIXTH CIRCUIT

The Sixth Circuit has recognized the doctrine of pendent-party jurisdiction in several contexts. In *Koppers Co., Inc. v. Garling & Langlois*, 594 F.2d 1094 (6th Cir. 1979), a subcontractor filed an action in state court against the general contractor, the disbursing agent, and the United States Department of Housing and Urban Development, as an assignee of the mortgage which it ensured.

Upon removal, complete diversity was destroyed by the presence of the United States. The court commented "[w]e note in passing that the only conceivable basis of federal jurisdiction over *Koppers'* claim against [the disbursing Agent] lies in the doctrine of 'pendent-party' jurisdiction." *Id.*, at 1097 n.1.

In *Beautytuft, Inc. v. Factory Insurance Association*, 431 F.2d 1122 (6th Cir. 1970), plaintiff policy holders brought a diversity action to recover losses from fifty-eight insurers. However, twenty-four defendants' claims fell below the $10,000 jurisdictional limit. In asserting pendent-party jurisdiction over these twenty-four defendants, the court held:

> As to the 24 defendants with lesser limits on their liability, the claims arise out of the same transaction in the proofs required [except as to amount of liability] are identical in every respect. Clearly, in the interest of avoiding sheer waste of court time, these claims should be tried together. We believe the District Judge was entirely correct in asserting pendent jurisdiction as to the 24 defendants.

Id., at 1128.

THE SEVENTH CIRCUIT

The Seventh Circuit has recognized and discussed the doctrine of pendent-party jurisdiction on several occasions. In *Price v. Pierce*, 823 F.2d 1114 (7th Cir. 1987) prospective tenants of low income housing brought an action against the Secretary of the Department of Housing and Urban Development and others, for breach of the contract between the developer and the department. A central issue was whether federal law or state law controlled. The court held that even if state law controlled the dis-

trict court could exercise pendent-party jurisdiction over the defendants without an independent jurisdictional basis.

> Now it is true that even if the contractual dispute in this case were governed by state law, it could be deemed a pendent to plaintiffs' federal statutory and constitutional claims . . . for we recognized 'pendent party' jurisdiction where the main claim is a federal-question rather than diversity claim. See *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1360 (7th Cir. 1985). (The citation is to one of the separate opinions, but it stated the view of the majority on this point. See *Id.*, at 1361.)

Price, 823 F.2d at 1119.

At least one district court within the Seventh Circuit has strongly supported the doctrine of pendent-party jurisdiction in actions brought under the Federal Tort Claims Act. In *Fried v. United States*, 579 F. Supp. 1212 (D.C. Ill. 1983) plaintiff was injured when he was exposed to poisonous nuclear waste at a laboratory owned by the United States. Plaintiff brought a personal injury action against the United States and several private defendants, alleging pendent-party jurisdiction under Federal Tort Claims Act. In a strongly worded opinion the court held that there were numerous factors which warranted the exercise of pendent-party jurisdiction in a FTCA case.

> It is also clear that Congress in enacting the Federal Tort Claims Act did not intend to deny jurisdiction over the non-federal defendants. The FTCA's grant of jurisdiction, including 'jurisdiction of any set-offs counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff,' 28 U.S.C. section 1346(c) indicates a congressional intent to have the United States' liability be determined in a single action.

Id., at 1222.

In addition to finding Congress intended that joint tort-feasors may be included in a Federal Tort Claims case, the court went on to discuss several policy considerations which warranted the court's exercise of pendent-party jurisdiction.

> The second factor in this case that counsels the courts to exercise pendent party jurisdiction is that the defendants are alleged to be joint tort-feasors. As such, many additional practical matters weigh heavily toward trying the cases together. For example, in separate trials each defendant could successfully seek to cast the blame on the other. In addition, since the United States could implead the state defendants, and probably would, the parties would all be in the same forum anyway. (Citations omitted).

Fried, 579 F. Supp., at 1223.

THE EIGHTH CIRCUIT

The Eighth Circuit has approved of pendent-party jurisdiction in federal question cases. In *State of North Dakota v. Merchants National Bank & Trust Co.*, 634 F.2d 368 (8th Cir. 1980) the state brought an action against the State Comptroller and five banks to review an administrative order and to assert state claims against the banks. After a review of the history of pendent-party jurisdiction from *Gibbs* through *Aldinger*, the court succinctly stated "after undertaking the analysis mandated by *Aldinger*, we are convinced that pendent party jurisdiction was not barred in this case." *Id.*, at 373.

In *Ausland v. United States*, 488 F. Supp. 426 (D.C. S.D. 1980), plaintiff's cattle were allegedly injured by unhealthy grain received through the United States Department of Agriculture. Plaintiff sued the government under the Federal Tort Claims Act and alleged pendent-party

tortfeasors in Federal Tort Claims Act cases. In a case with similar facts to the one at bar, *Lykins v. Pointer, Inc.*, 725 F.2d 645 (11th Cir. 1984), plaintiff filed an action for wrongful death and personal injuries received as a result of an aircraft accident. Plaintiff sued the Federal Aviation Adminsistration under the Federal Tort Claims Act, and included in the same action other private defendants without an independent basis of federal jurisdiction. The court recognized that "the Supreme Court has significantly circumscribed the power of federal courts to exercise pendent party jurisdiction." *Id.*, at 674. In Applying the *Gibbs/Aldinger* tests, the court analyzed the jurisdiction conferring statute and stated: "we find no express or implied negation of the federal court's power to hear pendent-party claims when that statute is invoked to confer jurisdiction on the district court." *Id.*, at 647.

The Circuit Court reversed and remanded to allow the District Court to exercise its discretion with respect to the pendent-party jurisdictional issue.

The Eleventh Circuit recently restated its adherence to the rule of pendent-party jurisdiction in *Brown v. United States*, 838 F.2d 1157 (11th Cir. 1988). In this case plaintiff filed an action against the Veteran's Administration Hospital under the Federal Tort Claims Act and against certain non-federal defendants with no other jurisdictional basis. The court restated its rationale in *Lykins*, and found that the district court properly exercised its discretion to decline pendent-party jurisdiction, on the grounds that the negligent acts of the federal and non-federal defendants were not related.

jurisdiction over certain non-governmental operators of the grain elevators. The court asserted pendent-party jurisdiction over these nongovernmental joint tortfeasors for the convenience of the parties, and to avoid multiple and possibly conflicting results. *Id.*, at 430.

THE NINTH CIRCUIT

The Ninth Circuit stands alone in its interpretation of this Court's decisions and its wholesale rejection of the doctrine of pendent-party jurisdiction.

THE TENTH CIRCUIT

In *Stewart v. United States*, 716 F.2d 755 (10th Cir. 1982), *cert. denied*, 469 U.S. 1018 (1984), a plaintiff who was injured on federal property brought an action against the government under the FTCA and against other non-federal defendants without an independent jurisdictional basis. In upholding the District Court's discretionary exercise of pendent-party jurisdiction, the court stated: "[m]oreover the grant of jurisdiction was made exclusively to the federal courts. Thus there is no indication that Congress declined to extend federal jurisdiction over such a pendent party as was the case in *Aldinger*." *Id.*, at 758. The Court concluded by stating: "[w]e hold, therefore, that subject matter jurisdiction in the district court existed of the claim against [the non-federal defendant] as one over which the district court properly exercised jurisdiction, pendent to the claim against the Government under the FTCA over which the federal court has exclusive jurisdiction." (Footnotes omitted) *Id.*, at 758-759.

THE ELEVENTH CIRCUIT

The Eleventh Circuit has twice ruled that pendent-party jurisdiction may be exercised over non-federal joint

DISTRICT OF COLUMBIA CIRCUIT

Although the circuit court has not yet squarely upheld the exercise of pendent-party jurisdiction, it has twice recognized the rule. See *Rieser v. District of Columbia*, 580 F.2d 647, 653 (D.C. Cir. 1978), and *Long v. District of Columbia*, 820 F.2d 409, 414-416 (D.C. Cir. 1978).

On at least one occasion the district court within the District of Columbia has assumed pendent-party jurisdiction over non-governmental defendants in a Federal Tort Claims Act case. In *Murphy v. United States*, 451 F. Supp. 544 (D.C.D.C. 1978), a former inmate of the District of Columbia Reformatory brought an action for injuries received from other inmates at the Reformatory. Plaintiff based jurisdiction against the United States under the Federal Tort Claims Act and the District of Columbia and its officials on the grounds of pendent-party jurisdiction. The court held:

> Applying the *Aldinger* analysis to the instant action, this Court concludes that the joinder of pendent parties should be permissible under the Federal Tort Claims Act and its jurisdictional counter part, 28 U.S. section 1346(b).

Id., at 547.

D. The Ayala Decision Is In Error.

In *Ayala v. United States of America*, 550 F.2d 1196 (9th Cir. 1977) numerous claims were filed against the United States of America under the Federal Tort Claims Act for recovery of damages arising out of the explosion of bomb-ladened box cars being hauled under contract with the U.S. Navy. Claimants sought to assert jurisdiction over the manufacturer of the box cars, Pullman, Inc., al-

though many were unable to meet diversity requirements, by arguing that the court should assume pendent-party jurisdiction. Relying on *Hymer v. Chai*, 407 F.2d 136 (9th Cir. 1969) and *Williams v. United States*, 405 F.2d 951 (9th Cir. 1969), the Ninth Circuit held the exercise of pendent-party jurisdiction was not permitted. Both *Hymer* and *Williams* predate the *Gibbs* decision expanding pendent jurisdiction beyond the narrow limits set by *Hurn v. Oursler, supra*. Thus, the *Ayala* court relied on outdated case law when it retreated to the *Hurn* progeny criteria. Since *Gibbs* expanded *Hurn*, *Ayala's* reliance on *Hurn* through *Hymer* and *Williams* is clearly misplaced and does not comport to the more recent decisions of this Court. Although the appellants in *Ayala* contended that the earlier decisions should be reexamined in light of the more relaxed standard of *Aldinger*, the circuit court rejected the suggestion, relied on its own reading of *Aldinger*, and looked to this Court for future guidance.

> [It may be] merely as another avoidance of the ultimate question of constitutional power left unanswered by the Court in *Moor* . . . .
>
> . . . [U]ntil the Supreme Court directly confronts the 'subtle and complex question with far-reaching implications posed by pendent party jurisdiction' (citation) we reaffirm *Williams* and *Hymer*. (footnote omitted).

Ayala, 550 F.2d at 1200.

Justice Marshall in *Moor v. County of Alameda, supra*, however, was critical of the very line of cases used to support *Ayala*.

> [T]he District Court and Court of Appeals considered themselves bound by the Ninth Circuit's previous decision in *Hymer v. Chai*, 407 F.2d 136 (1969). . . .

> *Hymer* stands virtually alone against this post-*Gibbs* trend in the courts of appeals, and significantly *Hymer* was largely based on the Court of Appeals' earlier decision in *Kataoka v. May Department Stores, Co.*, 115 F.2d 521 (CA 9 1940), a decision which predated *Gibbs* and the expansion of the concept of pendent jurisdiction beyond the narrow limits set by *Hurn v. Oursler, supra.* (footnotes omitted).

Moor, 411 U.S. at 713-714.

Petitioner suggests that the time has come to finally erase any ambiguity to the invalidity of *Hymer, Williams* and *Kataoka* in this post-*Gibbs* environment and force the Ninth Circuit into line with the other circuits that have addressed the issue.

II.

THE GIBBS AND ALDINGER TESTS WERE SATISFIED IN THE EXERCISE OF PENDENT-PARTY JURISDICTION OVER NON-FEDERAL JOINT TORTFEASORS

"Pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *Gibbs*, 383 U.S. at 726. Exercise of the discretion is proper, however, only when the circumstances meet the guidelines established in *Gibbs* and *Aldinger*. In the instant case, the district court assumed pendent-party jurisdiction over the joint tortfeasors (Pet. Cert. A-5-10) after addressing the substance of the *Gibbs* and *Aldinger* tests. In doing so, the district court did not expand jurisdiction beyond permissible limits, but rather applied it in a rational and logical manner.

A. In A Federal Tort Claims Act Case The Inclusion Of Joint Tortfeasors Satisfies The Gibbs Test.

The *Gibbs* Court established the criteria which must be met for the application of pendent jurisdiction:

> a. Judicial power exists wherever there is a claim arising under the Constitution, the laws of the United States, and treaties made under the authority of the U.S. Const., Article III, Section 2;
>
> b. The relationship between claims comprises but one constitutional "case";
>
> c. The federal claim must have sufficient substance to confer subject matter jurisdiction on the federal court;
>
> d. The state and federal claims must derive from a common nucleus of operative facts; and,
>
> e. Assuming substantiality of the federal issue, plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding.

Once a federal district court determines that pendent claims meet the above criteria, the federal court has the power to hear the claim pursuant to the authority of Article III of the Constitution absent specific congressional language to the contrary. *Gibbs*, 383 U.S. at 725.

The logical rationale for pendent claim jurisdiction is judicial efficiency and economy since it is wasteful to require parties necessarily before a federal court to go to the state courthouse to litigate a related claim arising from the same set of "operative facts." Also, there is a need to protect litigants from the possibility of inconsistent and irreconcilable verdicts. Clearly, claims that arise together should be tried together.

The instant case is the classic example of when the inclusion of non-diverse joint tortfeasors as pendent-parties to a case anchored on the Federal Tort Claims Act is a proper exercise of pendent jurisdiction under the *Gibbs* test.

1. Federal courts are vested with jurisdiction by the U.S. Constitution and by federal law to hear claims under the Federal Tort Claims Act against the United States of America as if the United States of America were a "private person."

The United States Constitution, Article III, section 2 states: "the judicial power shall extend . . . to controversies to which the United States shall be a party . . . ." Congress conferred exclusive power in district courts to adjudicate tort claims against the United States under the FTCA. The first element of the *Gibbs* test, i.e. ensuring Article III authority, is met either through reference to "the Laws of the United States" or "controversies to which the United States shall be a party."

A significant aspect of the Federal Tort Claims Act is that the United States is to be sued as "a private person" and is "liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. section 1346(b). In the instant case, the alleged negligent acts or omissions by federal employees occurred in California, thus mandating application of California law.

On June 3, 1986, California voters, through Proposition 51, amended *California Civil Code* sections 1431-1431.5 and abolished joint and several liability with respect to "non-economic damages" (pain and suffering and other

"subjective, non-monetary losses") in wrongful death actions and required use of "principals of comparative fault." Each defendant's liability for non-economic damages (which often comprise the bulk of plaintiff's recovery) must now be apportioned according to each defendant's percentage of fault. (*California Civil Code* § 1431.2 is reprinted in Appendix A to this Brief at A-12.)

While the full implications of Proposition 51 are still developing in California courts, it is clear that, in cases to which Proposition 51 applies, it requires fault apportionment among the entire "universe of actors," that is, all those at fault in causing the injury, whether or not they are sued.[3] Failure to join all wrongdoers could leave a plaintiff with a shortfall in recovery. As a practical matter, *Civil Code* section 1431.2 encourages plaintiffs to join all defendants against whom a viable cause of action could conceivably lie. Failure to permit plaintiff to proceed against all potentially liable defendants in a single action could severely inhibit the logical presentation of plaintiff's case and plaintiff's just recovery.

2. Facts before the court constitute one "case."

The second element of the *Gibbs* test requires a finding that the entire action before the court comprise but one constitutional "case." *Gibbs*, 427 U.S. at 725.

The *Gibbs* Court (citing *Hurn v. Oursler*, *supra*), observed that there may be different theories of liability or different factual settings, but where one relief is sought there is but one cause of action.

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[3]See *California Jury Instructions, BAJI*, 14.90 and 16.00 reproduced in Appendix A to this Brief at A-13.

> Upon principle, . . . [the injured party] suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.

Gibbs, 725 U.S. at 723, citing *Hurn*.

Under the FTCA, a plaintiff can assert an action for wrongful death caused in part by the negligence of government employees. Since there can be but one death, there is but one wrongful invasion even though it results from combined negligence. The inclusion of alleged concurrent tortfeasors does not create a second constitutional "case"; the second *Gibbs* criterion is met.

3. Proper subject matter jurisdiction exists.

Petitioner's claims against the United States of America must go forward in the United States District Court as FTCA jurisdiction is exclusive to that court. 28 U.S.C. section 1346(b).

4. The inclusion of joint tortfeasors is based on a "common nucleus of operative facts."

Where concurrent or joint tortfeasors act together to bring about plaintiff's injury, the claims arise from a "common" (indeed identical) "nucleus of facts operative facts." This is a simple tort case, not a complex federal question case in which a court may have to consider many factors to determine if different claims have a fundamental common basis. Here, a government employee and others

acted concurrently to bring about a single injury. The facts which will be proven to demonstrate the cause of the crash, the "common nucleus," are identical whether reference is made to federal or non-federal actions.

5. Plaintiff would expect to join joint tortfeasors before one tribunal in one judicial proceeding.

Petitioner's claims against the United States of America, the City of San Diego, and the San Diego Gas & Electric Company all arise from the crash of a light twin-engine aircraft approximately one mile east of Montgomery Field in San Diego on November 11, 1983. (J.A. 7). Testimony concerning the precise manner in which the accident occurred, the relative responsibilities, duties and liabilities of the parties and the assessment of damage will be substantially the same as against all defendants. Barring the jurisdictional restrictions which have arisen, petitioner would clearly expect to consolidate her claims against all defendants in one proceeding. Judicial economy, protection against possible inconsistent verdicts, and fairness to the litigants can only be met by permitting plaintiff to bring the claims against the federal and non-federal defendants in one proceeding.

One of petitioner's claims, that of negligent maintenance of the runway lights, is identical against both the United States of America and the City of San Diego. (J.A. 30-31). The approach lights to the airport were allegedly not operating on the night of the crash as a result of negligence on the part of both the City of San Diego and the United States of America. Clearly, it is far more economical and logical to sort out the various duties and re-

sponsibilities of the two defendants regarding maintaining the approach lights in the single forum.

B. In A Federal Tort Claims Act Case The Inclusion Of Joint Tortfeasors Satisfies The Aldinger Test.

In *Aldinger*, this Court avoided establishing a universal test upon which to base the exercise of pendent-party jurisdiction. It did note, however, that a federal court must satisfy itself both that Art. III power exists and that Congress has not expressly or by implication negated its existence in the jurisdiction conferring statute. *Aldinger*, 427 U.S. at 18.

1. The Federal Tort Claims Act confers Article III jurisdiction on district courts.

Article III jurisdiction unequivocally exists in the district courts to hear negligence claims against the United States of America through Congress' enactment of the FTCA. 28 U.S.C. section 1346(b).

2. Congress did not negate Article III power over pendent parties in the FTCA, but rather implied a clear intent to include third parties.

In enacting the FTCA, Congress intended that claims against the federal government be adjudicated by the federal courts. There is no implicit, and certainly no explicit, denial of concurrent federal court jurisdiction of other non-U.S. government parties in the same action. Respondent cannot possibly argue that if the district court had had jurisdiction over the other tortfeasors, either through diversity jurisdiction or pursuant to other federal jurisdiction, that the FTCA jurisdiction would implicitly

exclude inclusion of those parties in the same action in the district court.

To take the simplest case, assume Mrs. Finley resided in neighboring Arizona. The FTCA permits a plaintiff to bring suit either where he or she resides or where the act of omission allegedly constituting negligence occurred. 28 U.S.C. section 1346. Since the alleged negligence of the United States occurred in the Southern District of California, the Government could be sued there and the plaintiff, if resident in Arizona, could sue the City of San Diego and San Diego Gas & Electric Company in the same court pursuant to diversity jurisdiction. In that circumstance no provision of the FTCA would imply exclusion of those parties. The FTCA also does not imply exclusion of those parties where, as here, inclusion is based upon pendent jurisdiction.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that the Order of the United States Court of Appeals for the Ninth Circuit be reversed and the Order of the District Court be reinstated.

The discretion exercised by the District Court was based on valid principles of judicial economy and fairness.

Petitioner further requests this Court affirm the discretionary use of pendent jurisdiction, over non-federal de-

fendants in cases where plaintiffs are required to proceed against a joint tortfeasor exclusively in federal court.

Respectfully submitted,

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APPENDIX

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CONSTITUTION
of the
UNITED STATES OF AMERICA
ARTICLE III.—JUDICIAL POWER.

Art III, § 2, cl 1

Section 2, Clause 1. Subjects of jurisdiction.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

THE CODE OF THE LAWS
of the
UNITED STATES OF AMERICA
TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

CHAPTER 85. DISTRICT COURTS; JURISDICTION

28 USCS § 1346 United States as defendant

• • •

(b) Subject to the provisions of chapter 171 of this title [28 USCS §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

THE CODE OF THE LAWS
of the
UNITED STATES OF AMERICA
TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

CHAPTER 171. TORT CLAIMS PROCEDURE

Section
2671. Definitions
2672. Administrative adjustment of claims
2673. [Repealed]
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2675. Disposition by federal agency as prerequisite; evidence
2676. Judgment as bar
2677. Compromise
2678. Attorney fees; penalty
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§ 2671. Definitions

As used in this chapter [28 USCS §§ 2671 et seq.] and sections 1346(b) and 2401(b) of this title [28 USCS §§ 1346 (b) and 2401(b)[the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, tempo-

rarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

§ 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess

of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title [28 USCS § 2677] shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter [28 USCS §§ 2671, 2672, 2674-2680].

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

§ 2673. [Repealed]

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

§ 2676. Judgment as bar

The judgment in an action under section 1346(b) of this title [28 USCS § 1346(b)] shall constitute a complete bar

to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

§ 2677. Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346 (b) of this title [28 USCS § 1346(b)], after the commencement of an action thereon.

§ 2678. Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title [28 USCS § 2677], or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title [28 USCS § 2672].

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title [28 USCS § 1346(b)], and the remedies provided by this title in such cases shall be exclusive.

(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title [28 USCS §§ 1346

(b) and 2672] for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all

references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title [28 USCS § 1346(b)] shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 4 [46 USCS §§ 741 et seq], relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix [50 Appx USCS §§ 1 et seq.].

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) [Repealed]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title [28 USCS § 1346(b)] shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(*l*) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.

CALIFORNIA CIVIL CODE

§ 1431.2. Several Liability for Non-Economic Damages

(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

(b)(1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

(2) For the purposes of this section, the term "non-economic damages" means subjective, nonmonetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

(1986 Prop. 51 apr. June 3, 1986)

CALIFORNIA JURY INSTRUCTIONS CIVIL

Book of Approved Jury Instructions

[BAJI]

Seventh Edition
Prepared by

The Committee on Standard Jury Instructions, Civil,

of the

Superior Court of Los Angeles County, California

DAMAGES

D. DETERMINING DAMAGES UNDER COMPARATIVE NEGLIGENCE

BAJI 14.90 (1986 Revision)

REDUCTION OF DAMAGES BECAUSE OF CONTRIBUTORY NEGLIGENCE

If you find that plaintiff's injury was [proximately] [legally] caused by a combination of negligence of [one or more of] the defendant[s] and contributory negligence of the plaintiff, you will determine the amount of [all] damages to be awarded by you, as follows:

First: You will determine the total amount of [all economic and non-economic] damages to which the plaintiff would be entitled under the court's instructions if plaintiff had not been contributorily negligent.

Second: You will determine what proportion or percentage is attributable to the plaintiff of the total combined negligence of the plaintiff and of the defendant[s] [and of all other persons] whose negligence [proximately] [legally] contributed to the injury.

Third: You will then reduce [both] the total amount of plaintiff's [economic] damages [and plaintiff's non-economic damages] by the proportion or percentage of negligence attributable to the plaintiff.

Fourth: The resulting amount[s], after making such reduction, will be the [amount of your verdict] [amounts of economic and non-economic damages to be contained in your special verdict.]

BAJI 16.00 (1986 Revision)

FORM OF SPECIAL VERDICT—NEGLIGENCE

(Title of Court and Cause)

SPECIAL VERDICT

We, the jury in the above entitled case, find the following special verdict on the questions submitted to us:

Question No. 1: [Was] [Were any of] the defendant[s] negligent?

Answer "yes" or "no" after the name of [the] [each] defendant.

	Yes	No
Answer: Defendant———	———	———
[Defendant———	———	———]
[Defendant———	———	———]

If you answer Question No. 1 "no" as to [the] [each] defendant, sign and return this verdict.

If you answer Question No. 1 "yes" as to [the] [any] defendant, then answer Question No. 2 [as to such defendant].

Question No. 2: [As to each defendant that you answered "yes" to in response to Question No. 1.] was such negligence a [proximate] [legal] cause of [injury] [damage] to the plaintiff?

Answer "yes" or "no" after the name of [each] such defendant.

	Yes	No
Answer: Defendant———	———	———
[Defendant———	———	———]
[Defendant———	———	———]

If you answer Question No. 2 "no" [as to all

defendants], sign and return this verdict. If you answer Question No. 2 "yes" [as to any defendant], then answer the next question.

Question No. 3: Without taking into consideration the reduction of damages due to the negligence of the plaintiff, if any, what do you find to be the total amount of damages, including economic and non-economic damages, if any, suffered by the plaintiff as a [proximate] [legal] result of the accident involved herein?

Answer (a) Economic Damages $———

Answer (b) Non-Economic Damages $———

TOTAL ———

If you answer Question No. 3 "no damage", sign and return this verdict. If you answer Question No. 3 with an amount of money, answer Question No. 4.

Question No. 4: Was the plaintiff ——— negligent?

Answer "yes" or "no".

Answer: ———

If you answer Question No. 4 "no", do not answer Question No. 5. Instead proceed directly to Question No. 6. If you answer Question No. 4 "yes", then answer the next question.

Question No. 5: Was the negligence of the plaintiff ——— a [proximate] [legal] cause of [injury] [damage] to such plaintiff?

Answer "yes" or "no".

Answer: ———

Question No. 6: Assuming that 100% represents the total negligence which was the [proximate] [legal] cause of the plaintiff's [injury] [damage], what percentage of this 100% is due to the contributory negligence of the plaintiff and what percentage of this

100% is due to the negligence of the defendant[s] [and all other persons]?

Answer To plaintiff ——— ———%

[To plaintiff ——— ———%]

To defendant ——— ———%

[To defendant ——— ———%]

[Other person ——— ———%]
(Identify)

[Other person ——— ———%]
(Identify)

TOTAL ———%

Dated:

———
Foreman

RESPONDENT'S

BRIEF

(5)

Supreme Court, U.S.
FILED
JAN 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1973

In the Supreme Court of the United States

OCTOBER TERM, 1988

BARBARA FINLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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42 pp

QUESTION PRESENTED

Whether, in an action brought against the United States under the Federal Tort Claims Act, a district court may exercise "pendent party jurisdiction" over the plaintiff's claims against other persons, where there exists no independent basis for federal-court jurisdiction over the claims against those persons.

II

PARTIES TO THE PROCEEDING

Pursuant to the district court's order, which was reversed by the court of appeals, the City of San Diego and the San Diego Gas & Electric Company were added as defendants in this proceeding.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1973

BARBARA FINLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the district court (Pet. App. A5-A10) granting petitioner's motion to add the City of San Diego and the San Diego Gas & Electric Company as defendants in this action and certifying the question for interlocutory appeal is not reported. The order of the court of appeals (Pet. App. A3-A4) granting the government's petition for permission to take an interlocutory appeal and ordering the plaintiff to show cause why the district court's decision should not be summarily reversed is not reported. The order of the court of appeals (Pet. App. A1-A2) summarily reversing the district court's decision is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1988. The petition for a writ of certiorari was filed on June 2, 1988, and was granted on October 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The jurisdictional provision of the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), provides in pertinent part:

> Subject to the provisions of [28 U.S.C. 2671-2680], the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT

In November 1983, petitioner's husband and two daughters were killed in an airplane crash at Montgomery Field, an airport near San Diego, California, after the plane carrying them struck electric power lines on its approach to the runway. Pet. App. A6. Less than one year later, petitioner filed a tort suit in the California courts against the City of San Diego (the City) and the San Diego Gas & Electric Company (the Utility). She claimed that the

City had negligently failed to maintain and to operate the runway approach lights and that the lights were not working at the time of the crash. She also claimed that the Utility had negligently placed the transmission lines near the runway and failed to place warning lights on the poles supporting the lines. *Id.* at A6-A7.

After some discovery in the state-court suit, petitioner decided to pursue recovery against the federal government as well. In 1985, she submitted a claim for compensation to the Federal Aviation Administration (FAA). Upon the denial of the administrative claim, petitioner in May 1986 filed an action in federal court against the United States under the FTCA. In that suit, she alleged that the FAA had a duty to maintain and to operate the runway lights and, if the lights were not working, to inform pilots of the lights' malfunction. She also alleged that FAA air-traffic-control personnel had a duty to activate a special low altitude alert warning system, and to advise pilots of its use, in the circumstances that led to the crash. She claimed that the FAA breached those duties and that the United States was accordingly liable for the crash. Pet. App. A7; J.A. 8-10.

In March 1987, petitioner moved in the FTCA action for permission to file an amended complaint that would add the City and the Utility as new defendants and would add her state-law claims against them as new claims. J.A. 24. Petitioner acknowledged that there was no independent basis for federal jurisdiction over the claims against the City and the Utility because, as she states in this Court (Br. 3), "[n]o federal question is presented and the parties are not diverse." Nevertheless, petitioner contended that, based on the close relation between the claims against the City and Utility and the federal-law claims against the United States, the district court could assert "pendent par-

ty" jurisdiction over the new claims and parties. See J.A. 22-33.

Petitioner based her argument on this Court's ruling in *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), that in appropriate circumstances a federal court has power to exercise "pendent claim" jurisdiction—that is, jurisdiction over a state-law claim against a defendant who is already properly in the federal suit by virtue of a federal-law claim. *Gibbs* held that a federal court has authority to exercise such jurisdiction when the federal claim is substantial, when it and the state-law claim "derive from a common nucleus of operative fact," and when the plaintiff would ordinarily be expected to try all of the claims in a single proceeding. *Id.* at 725; see *Carnegie-Mellon Univ.* v. *Cohill*, No. 86-1021 (Jan. 20, 1988), slip op. 5-6. Although *Gibbs* involved jurisdiction over nonfederal claims against a federal-law defendant, petitioner suggested that the *Gibbs* standards also justify "pendent party" jurisdiction—that is, jurisdiction over a nonfederal claim against an entirely new party, one against which the plaintiff has asserted no federal-law or other claim that would independently support federal jurisdiction. See *Aldinger* v. *Howard*, 427 U.S. 1, 18 (1976); *Moor* v. *County of Alameda*, 411 U.S. 693, 713 (1973). Petitioner argued that her state-law claims against the City and the Utility and her FTCA claims against the United States were closely enough related to meet the *Gibbs* standards and that she could therefore add the new defendants and claims to her suit against the United States. J.A. 29-32.

The district court granted petitioner's motion. Pet. App. A5-A10. The court reasoned (*id.* at A8) that "from the perspective of judicial economy and efficiency * * * all of these actions ought to be tried together." Borrowing the *Gibbs* standards, the district court observed (*ibid.*)

that the FTCA claims against the government and the state-law claims against the City and the Utility "arise from a common nucleus of operative facts." The court added (*ibid.*) that, in its view, "[n]o significant additional burden would be placed upon any party by having the entire matter tried in federal court, in one trial." The court also noted that "all of the parties but for the UNITED STATES want to consolidate [the matters] for a single trial" (*id.* at A8-A9). The court concluded that it would "accept[ ] the invitation of plaintiff to assert pendent party jurisdiction over [the City and the Utility]" (*id.* at A9).

The district court recognized, however, that its ruling was "far from certain." Pet. App. A9. It pointed out (*id.* at A8) that the Ninth Circuit had specifically rejected the exercise of pendent party jurisdiction in an FTCA case, *Ayala* v. *United States*, 550 F.2d 1196 (9th Cir. 1977), cert. dismissed, 435 U.S. 982 (1978).[1] The district court therefore certified its ruling for interlocutory appeal under 28 U.S.C. (Supp. IV) 1292(b). Pet. App. A9-A10.

The government, pursuant to 28 U.S.C. (Supp. IV) 1292(b), petitioned the court of appeals to permit the interlocutory appeal. By order dated July 7, 1987, the court of appeals granted the government's petition and directed the plaintiff to "show cause why the district court's order should not be summarily reversed under *Ayala*." Pet. App. A3-A4. On March 4, 1988, the court of appeals summarily reversed the district court's decision (*id.* at A1-A2).

---

[1] The Ninth Circuit held in *Ayala*, and has held in several other cases both before and after *Ayala*, that an independent basis of jurisdiction is required over claims against any party other than the United States in an FTCA suit. *Ayala*, 550 F.2d at 1198; see, *e.g.*, *Idaho ex rel. Trombley* v. *United States Dep't of the Army, Corps of Engineers*, 666 F.2d 444, 446 (9th Cir.), cert. denied, 459 U.S. 823 (1982); *Williams* v. *United States*, 405 F.2d 951, 954 (9th Cir. 1969).

SUMMARY OF ARGUMENT

1. It is a cardinal principle of federal law that the limits of district court jurisdiction are determined by statute. See *Sheldon* v. *Sill,* 49 U.S. (8 How.) 441, 449 (1850). In accord with that principle, the Court's decision in *Aldinger* v. *Howard,* 427 U.S. 1 (1976), teaches that—whatever Article III of the Constitution may permit—the primary focus of the inquiry into whether pendent party jurisdiction is proper in a particular case must be on the statutes that authorize the bringing of that case in federal court. If Congress has "expressly or by implication negated [the] existence" (*id.* at 18) of federal jurisdiction over the plaintiff's nonfederal claims against the pendent party, then the district courts are without power to exercise jurisdiction. The *Aldinger* Court thus ruled that "[r]esolution of a claim of pendent-party jurisdiction * * * calls for careful attention to the relevant statutory language" (*id.* at 17), in order to determine "whether by virtue of the statutory grant of subject-matter jurisdiction, upon which [the plaintiff's] principal claim * * * rests, Congress has addressed itself to the *party* as to whom jurisdiction pendent to the principal claim is sought" (*id.* at 16 (emphasis in original)).

2. In the context of the FTCA, that critical question should receive the same answer as it did in the setting presented in *Aldinger*: Congress did address itself to the parties that a plaintiff may sue in an FTCA action, and it excluded parties like the City and the Utility here. The FTCA limits its grant of jurisdiction to actions on claims against a specified party, namely, "civil actions on claims against the United States" (28 U.S.C. 1346(b)). That provision, basing jurisdiction on the identity of the defendant, should be construed as excluding claims against other persons from the FTCA's jurisdictional grant.

To begin, the FTCA's original language granted jurisdiction to the federal courts only "to hear, determine, and render judgment on any claim against the United States" of the specified type (Legislative Reorganization Act of 1946, ch. 753, § 410(a), 60 Stat. 844; 28 U.S.C. (1946 ed.) 931(a)). That language is expressly limited to adjudication of claims against the United States and could not support pendent party jurisdiction. The current language, which speaks of "actions on" such claims, was not intended to alter the scope of the jurisdictional grant.

Moreover, the well-understood purpose of the FTCA was simply to waive the government's traditional sovereign immunity from tort liability and to transfer into federal court the tort claims that had previously been addressed in the forum of Congress (through private bills). As a waiver of sovereign immunity, the FTCA jurisdictional provision should be narrowly construed. As the Seventh Circuit recently stated in another, comparable setting, "[i]t would be odd if a jurisdictional statute of such limited and specialized purpose allowed the plaintiff fortunate enough to be able to get into district court under it to haul in a *non*governmental party (who could not in any event plead the defense of sovereign immunity) against which the plaintiff had a claim purely of state law" (*Citizens Marine National Bank* v. *United States Dep't of Commerce,* 854 F.2d 223, 226-227 (7th Cir. 1988), petition for cert. filed, No. 88-940 (Dec. 7, 1988)).

The legislative history of the FTCA, which petitioner does not even discuss, confirms that Congress did not intend the FTCA to support pendent party jurisdiction. Key congressional committee reports make clear that in waiving sovereign immunity from certain tort suits, Congress was borrowing from the approach it had used in the Tucker Act's provisions for nontort suits against the United States, 28 U.S.C. 1346(a). The committee reports

explain the Tucker Act analogy and cite *United States* v. *Sherwood,* 312 U.S. 584, 588-589 (1941), in which this Court held that Tucker Act suits may not include defendants other than the United States. The reports expressly state that, like the Tucker Act, the FTCA "does not permit any person to be joined as a defendant with the United States." *E.g.*, H.R. Rep. 1287, 79th Cong., 1st Sess. 5 (1945).

The background understanding is consistent with the complete absence of any suggestion of pendent party jurisdiction in the FTCA. That absence is significant because Congress recognized and on several occasions addressed the most obvious situation in which such jurisdiction might have been provided for—a tort suit against the government employee tortfeasor that would otherwise be brought in state court.

3. Petitioner's argument for pendent party jurisdiction is based on general policy considerations that are not tied to any indicia of congressional intent. Although practical considerations of judicial administration may properly enter into the construction of jurisdictional statutes, in the FTCA setting such considerations are not strong enough to overcome the numerous indications that Congress in the FTCA did not furnish a basis for federal jurisdiction over defendants other than the United States. Indeed, petitioner's practical policy arguments, even judged on their own terms, are much less persuasive than she suggests. Thus, petitioner's arguments of convenience and judicial economy ignore the host of special rules that Congress has established to govern FTCA litigation. Those special rules show that, in a variety of important respects relating to both questions of fact and questions of law, a plaintiff's ordinary state-law tort claim against a "pendent" co-defendant typically differs markedly from an FTCA claim against the United States. Consequently, the efficiency

gains that would allegedly flow from allowing pendent party jurisdiction are to a large extent illusory.

ARGUMENT

FEDERAL DISTRICT COURTS MAY NOT EXERCISE PENDENT PARTY JURISDICTION IN ACTIONS AGAINST THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT

A. Pendent Party Jurisdiction Is Impermissible Under A Particular Statute If Congress Has Expressly Or By Implication Negated Its Existence

Building on long-established precedent, this Court held in *United Mine Workers* v. *Gibbs, supra,* that federal courts have the power to exercise pendent *claim* jurisdiction in specified circumstances, *i.e.*, jurisdiction over "additional *claims* between parties with respect to whom there is federal jurisdiction." *Aldinger,* 427 U.S. at 6.[2] By contrast, this Court has not resolved the general question whether the federal courts may exercise pendent *party* jurisdiction, *i.e.*, jurisdiction over "additional *parties* with respect to whom there is no independent basis of federal jurisdiction" (*ibid.*). Indeed, the latter concept is a relatively new one: "Until approximately 10 years ago, pendent party jurisdiction was rejected." Miller, *Ancillary and Pendent Jurisdiction,* 26 So. Tex. L.J. 1, 11 (1985). And this Court has twice declined to address the general question of when, if ever, pendent party jurisdiction is permissible under Article III of the Constitution or "to

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[2] *Gibbs* and its predecessors were couched in terms of Article III power, because "[n]one of them posed the need for a further inquiry into the underlying statutory grant of federal jurisdiction." *Aldinger* v. *Howard,* 427 U.S. 1, 13-14 (1976). The statutory grants of federal-question jurisdiction at issue in those cases were broad enough to encompass the pendent *claim* jurisdiction permitted by Article III.

formulate any general, all encompassing jurisdictional rule." *Aldinger,* 427 U.S. at 13; *Moor* v. *County of Alameda,* 411 U.S. 693, 713-716 (1973).

In declining to address the general question, the Court has observed that "there is a significant difference between" pendent party jurisdiction and pendent claim jurisdiction because the former "require[s] [the court] to bring an entirely new party—a new defendant—into [the] litigation." *Moor* v. *County of Alameda,* 411 U.S. at 713. In *Aldinger,* the leading decision on pendent party jurisdiction, the Court recognized the judicial-economy justification for the *Gibbs* principle, and it then explained (427 U.S. at 14):

> The situation with respect to the joining of a new party, however, strikes us as being both factually and legally different from the situation facing the Court in *Gibbs* and its predecessors. From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state-law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to join an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant "derive from a common nucleus of operative fact."

See *Owen Equipment & Erection Co.* v. *Kroger,* 437 U.S. 365, 370 (1978) ("[t]he *Gibbs* case differed from this one in that it involved * * * the resolution of a plaintiff's federal-

and state-law claims against a single defendant"). Thus, the Court has admonished that, whereas pendent claim jurisdiction is permissible under Article III, the general question whether federal courts may exercise pendent-party jurisdiction consistent with Article III is "a subtle and complex question with far-reaching implications." *Moor,* 411 U.S. at 715; see *Aldinger,* 427 U.S. at 2, 18.[3]

As this Court has often acknowledged, constitutional questions should not needlessly be addressed. See, *e.g., Rescue Army* v. *Municipal Court,* 331 U.S. 549, 568-575 (1947); *Ashwander* v. *TVA,* 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). With respect to the jurisdiction of the federal district courts, moreover, consitutional questions are necessarily secondary to statutory questions, for it is a fundamental principle that "federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress" (*Aldinger,* 427 U.S. at 15). See *Sheldon* v. *Sill,* 49 U.S. (8 How.) 441, 449 (1850) ("Courts created by statute can

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[3] In *Ayala,* the precedent on which the court of appeals relied in rejecting pendent party jurisdiction in the present case, the Ninth Circuit stated that the "difficulty with pendent party jurisdiction is a *constitutional* one under Article III" (550 F.2d at 1199, 1201 n.8). Indeed, reflecting the view that the doctrine is inconsistent with the limited grant of jurisdiction to the federal courts in Article III of the Constitution, the Ninth Circuit has rejected the doctrine of pendent party jurisdiction not only in FTCA cases but in several other contexts as well. *E.g., Carpenters Southern Cal. Admin. Corp.* v. *D & L Camp Constr. Co.,* 738 F.2d 999, 1000 (9th Cir. 1984) (ERISA, 29 U.S.C. 1132); *Safeco Ins. Co.* v. *Guyton,* 692 F.2d 551, 555 & n.5 (9th Cir. 1982) (diversity); *Munoz* v. *Small Business Admin.,* 644 F.2d 1361, 1365 (9th Cir. 1981) (15 U.S.C. 634(b)(1)); see *Danner* v. *Himmelfarb,* 858 F.2d 515, 522 (9th Cir. 1988). See also *Moore* v. *Marketplace Restaurant, Inc.,* 754 F.2d 1336, 1359 (7th Cir. 1985) (separate opinion of Posner, J.) (suggesting that "[t]he 'pendent parties' concept has * * * wobbly constitutional foundations").

have no jurisdiction but such as the statute confers"); see also, *e.g.*, *Christianson* v. *Colt Industries Operating Corp.*, No. 87-499 (June 17, 1988), slip op. 15; *Lockerty* v. *Phillips*, 319 U.S. 182, 187 (1943); *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 233-234 (1922). Accordingly, if a suit is outside the jurisdiction contemplated in the relevant federal statutes, no constitutional questions about jurisdiction need be reached.

The *Aldinger* Court applied those principles to the issue of pendent party jurisdiction. It made clear that the statutory authority for pendent party jurisdiction in a particular case should be the primary focus of judicial inquiry, for if the claim against the pendent party is outside the jurisdictional limits set by Congress, the court would not have to address the "subtle and complex" constitutional questions about whether and to what extent pendent party jurisdiction is *generally* available. Thus, the Court stated, whether pendent party jurisdiction exists in a particular case "turns initially, not on the general contours of the language in Art. III, * * * but upon the deductions which may be drawn from congressional statutes as to whether Congress wanted to grant this sort of jurisdiction to federal courts" (427 U.S. at 16-17).

The *Aldinger* Court further explained that the inquiry should focus on the particular statute that establishes federal jurisdiction over the principal claim. The key question, the Court stated, is "whether by virtue of the statutory grant of subject-matter jurisdiction, upon which [the plaintiff's] principal claim * * * rests Congress has addressed itself to the *party* as to whom jurisdiction pendent to the principal claim is sought" (427 U.S. at 16). The Court elaborated: "Resolution of a claim of pendent-party jurisdiction * * * calls for careful attention to the relevant statutory language" (*id.* at 17); and "as against a plaintiff's claim of *additional* power over a 'pendent party,' the reach

of the statute conferring jurisdiction should be construed in light of the scope of the cause of action as to which federal judicial power *has* been extended by Congress" (*ibid.*). The Court directed that the inquiry into whether the pertinent statutes preclude pendent party jurisdiction was required even though such jurisdiction might be supported by "the same considerations of judicial economy" as those supporting pendent claim jurisdiction (*id.* at 14-15).

Following that approach, the *Aldinger* Court rejected the particular claim that was before it—a claim that in a federal civil rights action against county officials, pendent party jurisdiction could be asserted over a state-law action against the county—and so found it unnecessary to address any broader questions concerning pendent party jurisdiction. The plaintiff had founded her principal claim on 28 U.S.C. 1343(3), which grants jurisdiction over "any civil action authorized by law" that is brought to redress certain civil rights violations; and the "civil action" she brought was a suit against county officials under 42 U.S.C. 1983, which declares that "[e]very person" who commits certain civil rights violations "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Of course, the Court could not find in those statutes an express preclusion of pendent party jurisdiction over the plaintiff's state-law claim against the county. Rather, the Court found that the statutes implicitly precluded such jurisdiction because, based on then-settled precedent, a county was not a "person" subject to suit under Section 1983.[4] As the Court ex-

[4] That precedent was later overruled in *Monell* v. *Dep't of Social Services*, 436 U.S. 658 (1978). But "*Monell* in no way qualifies the holding of *Aldinger* that the jurisdictional questions * * * are statutory as well as constitutional." *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365, 373 n.12 (1978). Nor does it undermine

plained, "[p]arties such as counties, whom Congress *excluded* from liability in § 1983, * * * can argue with a great deal of force that the scope of that 'civil action' over which the district courts have been given statutory jurisdiction should not be so broadly read as to bring them *back* within that power merely because the facts also give rise to an ordinary civil action against them under state law" (427 U.S. at 17).

The *Aldinger* Court emphasized the statute-specific character of its holding: "we decide here only the issue of so-called 'pendent-party' jurisdiction with respect to a claim brought under §§ 1343(3) and 1983. Other statutory grants and other alignments of parties and claims might call for a different result." 427 U.S. at 18. In particular, the Court pointed out that "[w]hen the grant of jurisdiction to a federal court is exclusive, * * * as in the prosecution of tort claims against the United States under 28 U.S.C. § 1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only* in a federal court may all of the claims be tried together." 427 U.S. at 18 (footnote omitted). The Court did not speculate on how the FTCA inquiry might be resolved, however, and it declined to consider any statute not before it, declaring that "it would be as unwise as it would be unnecessary to lay down any sweeping pronouncement upon the existence or exercise of [pendent party] jurisdiction" (*ibid.*). Instead, the Court reiterated that in any particular case, "[b]efore it can be concluded that such jurisdiction exists, a federal court must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence" (*ibid.*).

Aldinger's approach in analyzing the statute to determine whether pendent party jurisdiction is permissible.

Accordingly, whether the district court in the present case has the power to exercise pendent party jurisdiction over the City and the Utility turns, as a primary matter, on whether the FTCA's grant of jurisdiction over the United States "expressly or by implication negate[s] its existence" (*Aldinger*, 427 U.S. at 18). For the reasons stated below, we submit that the fairest reading of the FTCA is that it does preclude pendent party jurisdiction, regardless of whether the *Gibbs* standards for pendent *claim* jurisdiction are met.[5] Of course, that conclusion is by its terms limited to the FTCA and makes it unnecessary to resolve the permissibility of pendent party jurisdiction under Article III of the Constitution or in any other statutory setting.

B. The Language, Purpose, And Legislative History Of The Federal Tort Claims Act Negate The Existence Of Pendent Party Jurisdiction In That Setting

Although in this case, as in *Aldinger*, the constitutional questions of the permissibility of pendent party jurisdiction need not and should not be reached,[6] the seriousness

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[5] Petitioner's extensive focus on *Gibbs* ignores "the holding of *Aldinger* that the jurisdictional questions [regarding pendent party jurisdiction are] statutory as well as constitutional" (*Kroger*, 437 U.S. at 373 n.12) and that "the extension of *Gibbs* to this kind of 'pendent party' jurisdiction—bringing in an additional defendant at the behest of the plaintiff—presents rather different statutory jurisdictional considerations" (*Aldinger*, 427 U.S. at 15). Where, as here, the question is one of pendent party jurisdiction, "a finding that federal and nonfederal claims arise from a 'common nucleus of operative fact,' the test of *Gibbs*, does not end the inquiry into whether a federal court has power to hear the nonfederal claims along with the federal ones." *Kroger*, 437 U.S. at 373.

[6] The precise constitutional questions raised by pendent party jurisdiction depend on which of the bases of jurisdiction defined by Article III supports jurisdiction over the claim against the principal defendant. For example, the question whether a new party may be brought

of those questions has a bearing on the proper construction of the provisions of the FTCA. This Court has often applied the principle that statutes should be construed, if possible, to avoid raising serious constitutional questions. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, No. 86-1461 (Apr. 20, 1988), slip op. 6-7; *Webster* v. *Doe*, No. 86-1294 (June 15, 1988), slip op. 10; *United States* v. *Clark*, 445 U.S. 23, 27 (1980); *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500-501 (1979). It may well be, as we suggested in our brief in *Ayala* (at 10-11), that pendent party jurisdiction would be constitutionally proper if Congress provided for it. But the district courts' jurisdiction should not be stretched into areas that raise substantial, unresolved constitutional questions, at least where there are strong indications that Congress did not intend the jurisdiction-defining statutes to reach that far.[7]

In the FTCA context, there are such strong indications. Indeed, recognizing pendent party jurisdiction over parties other than the United States would be inconsistent with the careful limits on the jurisdiction granted by Congress in the FTCA. Here, as in *Aldinger*, the provision granting jurisdiction over the principal defendant is limited to a class of persons that excludes the pendent parties. Accordingly, the FTCA jurisdictional provision, properly understood, shows that "Congress has addressed itself to the *party* as to whom jurisdiction pendent to the principal claim is sought" (*Aldinger*, 427 U.S. at 16) and "by implication negate[s]" (*id.* at 18) the existence of pendent party jurisdiction. This does not preclude such parties from being brought into federal court under some other jurisdictional provision, as when the United States impleads another person under 28 U.S.C. 1345; it merely means that the FTCA itself does not furnish jurisdiction over state-law claims against persons other than the United States.

To begin with the statutory language, the FTCA confers upon the federal courts jurisdiction over "civil actions on *claims against the United States*." 28 U.S.C. 1346(b) (emphasis added). The most natural reading—perhaps the only natural reading—of that language is that it extends only to the adjudication of claims against the United States: suits requiring the adjudication of claims against other persons are not readily described as "actions on claims against the United States." Moreover, *Aldinger* demonstrates the significance of the fact that the statute bases jurisdiction on the identity of specified parties—that it grants jurisdiction in a class of cases defined by the presence of a single party, the United States, as a defendant.[8] If, in *Aldinger*, the statutory reference to "persons" was construed as excluding those (such as counties) that were not within the class mentioned, the FTCA's reference to a far narrower class of defendants (consisting only of the United States) suggests even more strongly the exclu-

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within a "Case[ ] * * * arising under [federal law]" is different from the question whether a new party may be included within a "Controvers[y] to which the United States [is] a Party."

[7] See also *Romero* v. *International Terminal Co.*, 358 U.S. 354, 379 (1959) (rejecting jurisdiction based partly on "the deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes"); *American Fire & Cas. Co.* v. *Finn*, 341 U.S. 6, 17 (1951) ("[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation").

[8] Although the Ninth Circuit has rested its rejection of FTCA pendent party jurisdiction partly on constitutional grounds (see note 3, *supra*), it has also noted the exclusivity of Section 1346(b)'s reference to the United States in justifying its position. See *Davis* v. *United States*, 667 F.2d 822, 825 (9th Cir. 1982); *Morris* v. *United States*, 521 F.2d 872, 875 (9th Cir. 1975).

sion of all other persons from the FTCA's jurisdictional grant.[9] In this respect, the FTCA is like the diversity statute, 28 U.S.C. 1332, under which the requirement of complete diversity precludes the exercise of pendent party jurisdiction such as petitioner asserts. See *Owen Equipment & Erection Co.* v. *Kroger, supra*; see also *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973) (all plaintiffs must meet the jurisdictional amount requirement of the diversity statute).[10]

[9] The Third Circuit drew a similar conclusion in rejecting pendent party jurisdiction under another federal jurisdictional statute that makes jurisdiction turn on the identity of the parties, 28 U.S.C. 1349 (concerning federal corporations): "just as jurisdiction in *Aldinger* was based on what was viewed then as a limited grant of jurisdiction enabling federal courts to hear suits against municipal officials but not against the municipalities themselves * * *, so too is jurisdiction here premised on a limited grant of jurisdiction over particular parties." *Lovell Manufacturing* v. *Export-Import Bank*, 843 F.2d 725, 732 (3d Cir. 1988).

[10] The FTCA is in this respect unlike the federal-question jurisdictional statute, 28 U.S.C. 1331, which is not party-specific and which therefore does not suggest any exclusion of particular parties from suits brought under it. Indeed, aside from the FTCA cases, all of the lower court decisions described by petitioner (Br. 12-26) that approve pendent party jurisdiction involve statutes that base jurisdiction on the presence of a particular federal question, and not on the identity of the parties. See *Bowers* v. *Moreno*, 520 F.2d 843 (1st Cir. 1975) (29 U.S.C. 186(e)); *Weinberger* v. *Kendrick*, 698 F.2d 61 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983) (28 U.S.C. 1331); *Leather's Best, Inc.* v. *S.S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971) (28 U.S.C. 1333 (admiralty)); *Boudreaux* v. *Puckett*, 611 F.2d 1028 (5th Cir. 1980) (15 U.S.C. 1989); *Connecticut General Life Ins. Co.* v. *Craton*, 405 F.2d 41 (5th Cir. 1968) (29 U.S.C. 185); *Price* v. *Pierce*, 823 F.2d 1114 (7th Cir. 1987) (28 U.S.C. 1331), cert. denied, No. 87-967 (Mar. 21, 1988); *North Dakota* v. *Merchants Nat'l Bank & Trust Co.*, 634 F.2d 368 (8th Cir. 1980) (28 U.S.C. 1331). See also *FDIC* v. *Otero*, 598 F.2d 627 (1st Cir. 1979) (12 U.S.C. 1819 Fourth, expressly granting jurisdiction whenever FDIC in its corporate capacity is a party, regardless of other parties and claims). The sole exception is *Beautytuft, Inc.* v. *Factory Ins. Ass'n*, 431 F.2d 1122 (6th Cir. 1970), which involved diversity and is almost certainly inconsistent with this Court's subsequent decision in *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973).

By contrast, in addition to the diversity cases and the Third Circuit's *Lovell* decision (see note 9, *supra*), several decisions have disapproved or cast doubt on pendent party jurisdiction where the jurisdictional statute based jurisdiction on the identity of the parties. *Citizens Marine Nat'l Bank* v. *United States Dep't of Commerce*, 854 F.3d 223 (7th Cir. 1988) (19 U.S.C. 2350), petition for cert. filed, No. 88-940 (Dec. 7, 1988); *Center Glass & Trim Co.* v. *United States*, 637 F. Supp. 209, 212 (S.D. W. Va. 1986) (42 U.S.C. 4072); *Cheltenham Supply Corp.* v. *Consolidated Rail Corp.*, 541 F. Supp. 1103, 1107 (E.D. Pa. 1982) (49 U.S.C. 11707).

The original language of the FTCA's jurisdictional provision confirms that persons other than the United States are excluded from its reach. The federal courts were given "jurisdiction to hear, determine, and render judgment on any claim against the United States" that met the specified conditions for FTCA coverage. Legislative Reorganization Act of 1946, ch. 753, § 410(a), 60 Stat. 844; 28 U.S.C. (1946 ed.) 931(a). No argument for pendent party jurisdiction would be compatible with that language.[11] And when the current language was adopted as part of the 1948 codification of Title 28 of the United States Code (Act of June 25, 1948, ch. 646, 62 Stat. 869), there was no indication whatever that Congress intended to expand the scope of the FTCA's jurisdictional grant when making the change; indeed, the minor change in wording was not even noted by the revisers. See 28 U.S.C. 1346 revision notes. Section 1346(b) should therefore be construed to go no further than the FTCA did in 1946.

[11] The final Senate committee report accompanying the bill that became the FTCA states that the statute "permits suits on tort claims to be brought *against the United States*" and that it "vests exclusive jurisdiction in the United States district courts *over claims against the United States*." S. Rep. 1400, 79th Cong., 2d Sess. 29, 32 (1946) (emphasis added).

The sovereign immunity background of the FTCA further supports construing the FTCA jurisdictional provision to reach only "claims against the United States." Prior to the enactment of the FTCA, persons injured through the negligence of government employees were, with exceptions, without judicial recourse against the government; they had to seek relief from Congress through private bills. The FTCA was designed to waive the government's sovereign immunity and thus to shift tort claims from a congressional to a judicial forum, thereby alleviating both the burden on Congress and the injustice perceived to result from the government's traditional immunity from suit. See, *e.g., United States* v. *Muniz,* 374 U.S. 150, 154, 165 (1963); *Dalehite* v. *United States,* 346 U.S. 15, 24-25 & n.9 (1953); *United States* v. *Yellow Cab Co.,* 340 U.S. 543, 549 (1951) (FTCA "merely substitutes the District Courts for Congress as the agency to determine the validity and amount of the claims"); *Feres* v. *United States,* 340 U.S. 135, 139 (1950); S. Rep. 1400, 79th Cong., 2d Sess. 29 (1946) (FTCA "waives, with certain limitations, governmental immunity to suit in tort and permits suits on tort claims to be brought against the United States. It is complementary to the provision in title I [of the bill containing the FTCA as title IV] banning private bills and resolutions in Congress, leaving claimants to their remedy under this title").[12]

As a waiver of the sovereign immunity of the United States, the FTCA must be "construe[d] strictly in favor of the sovereign." *Library of Congress* v. *Shaw,* 478 U.S. 310, 318 (1986); see, *e.g., Ruckelshaus* v. *Sierra Club,* 463 U.S. 680, 685-686 (1983); *McMahon* v. *United States,*

[12] See also S. Rep. 1400, 79th Cong., 2d Sess. 30-31 (1946); S. Rep. 1011, 79th Cong., 2d Sess. 25 (1946); H.R. Rep. 1675, 79th Cong., 2d Sess. 25 (1946); H.R. Rep. 1287, 79th Cong., 1st Sess. 2 (1945); H.R. Rep. 2245, 77th Cong., 2d Sess. 5 (1942); S. Rep. 1196, 77th Cong., 2d Sess. 5 (1942); H.R. Doc. 562, 77th Cong., 2d Sess. (1942).

342 U.S. 25, 27 (1951). That principle, moreover, was well established at the time of the FTCA's enactment, and Congress was acutely aware of it when it enacted the FTCA. *United States* v. *Sherwood,* 312 U.S. 584, 590 (1941); *Eastern Transportation Co.* v. *United States,* 272 U.S. 675, 686 (1927); see H.R. Rep. 1287, 79th Cong., 1st Sess. 5 (1945) (citing *Sherwood*). In these circumstances, it would be inappropriate to construe Section 1346(b) expansively so as to subject the United States to suits not clearly within the scope of Congress's consent – namely, suits involving parties who are not brought into the case by virtue of an independent grant of federal jurisdiction and whose presence would generally cause complication and delay.

There is simply no reason, based on the purposes of the FTCA, to read Section 1346(b)'s waiver of sovereign immunity as saddling the federal courts with ordinary tort claims between nondiverse private parties. As the Seventh Circuit has recently stated in another context involving a similar statute (*Citizens Marine National Bank* v. *United States Dep't of Commerce,* 854 F.2d at 226-227 (rejecting claim of pendent party jurisdiction under the Trade Act of 1974, 19 U.S.C. 2350)): "The statute on which the district court's jurisdiction over the main claim * * * is based is narrowly drawn; * * * all it does is lift the bar of sovereign immunity * * *. It would be odd if a jurisdictional statute of such limited and specialized purpose allowed the plaintiff fortunate enough to be able to get into district court under it to haul in a *non*governmental party (who could not in any event plead the defense of sovereign immunity) against which the plaintiff had a claim purely of state law * * *." Moreover, state-law tort claims between nondiverse parties could not, of course, be heard in federal court prior to 1946, when tort claims against the government generally had to be pursued in Congress. A transfer into federal court of any state-law tort claims against

nongovernment parties is outside the scope of a measure that, as this Court characterized the FTCA, "merely substitute[d] the District Courts for Congress as the agency to determine the validity and amount of the claims" against the government. *Yellow Cab,* 340 U.S. at 549.

The legislative history makes explicit Congress's reliance on this Court's decision interpreting an analogous statute in *United States* v. *Sherwood, supra. Sherwood* explained that, under the Tucker Act (Act of Mar. 3, 1887, ch. 359, 24 Stat. 505; 28 U.S.C. 1346(a)), it had "been uniformly held" that the jurisdiction of the Court of Claims "is confined to the rendition of money judgments in suits brought for that relief against the United States, and if the relief sought is against others than the United States the suit as to them must be ignored as beyond the jurisdiction of the court, or if its maintenance against private parties is prerequisite to prosecution of the suit against the United States the suit must be dismissed." 312 U.S. at 587-588 (citations omitted). The Court held that the same rules applied to the district courts' jurisdiction under the Tucker Act, and it therefore dismissed a district court Tucker Act suit against the government in which a private person was a necessary party. The Court stated that the government's consent to be sued "may be conditioned, as we think it has been here, on the restriction of the issues to be adjudicated in the suit, to those between the claimant and the Government." *Id.* at 591.

In 1942, after the legislative process leading to enactment of the FTCA had been underway for a number of years, the House Committee on the Judiciary reported a bill on the subject that was similar to the bill ultimately enacted four years later. In explaining the jurisdictional provision of the bill, the Committee stated that the district courts were to "exercise essentially the same type of jurisdiction as district courts exercise concurrently with the

Court of Claims of the United States under the Tucker Act." H.R. Rep. 2245, 77th Cong., 2d Sess. 9 (1942). The Committee added: "The bill therefore does not permit any person to be joined as a defendant with the United States and does not lift the immunity of the United States from tort actions except as jurisdiction is specifically conferred upon the district courts by this bill. See *United States v. Sherwood,* 312 U.S. 584 (1941) * * *." H.R. Rep. 2245, *supra,* at 9. Later in its report, the Committee explained that it was deleting a provision of the Senate bill concerning proportionate liability of the government and joint tortfeasors in order to leave the matter to state law. The Committee noted: "However, as stated above, no person may be joined with the United States as a defendant." *Id.* at 12.

In 1945, the same House Committee reported a similar bill, H.R. 181, 79th Cong., 1st Sess. It repeated verbatim its 1942 passage drawing the analogy to the Tucker Act, citing *Sherwood,* and stating that the FTCA "does not permit any person to be joined as a defendant with the United States." H.R. Rep. 1287, 79th Cong., 1st Sess. 5 (1945). The bill reported by that House Report was "virtually identical" (*Muniz,* 374 U.S. at 157 n.11) to the bill that was ultimately enacted as the FTCA. See S. Rep. 1400, *supra,* at 30 (House bill is "almost identical" with bill that was enacted; "essential difference" is that the new bill removed the House bill's $10,000 ceiling on claims).[13]

This history is highly probative of what Congress understood to be the reach of the FTCA jurisdictional provision.[14] It confirms that Congress was fully aware of the

[13] The FTCA expressly borrowed the Tucker Act's "provisions for counterclaim and set-off, for interest upon judgments, and for payment of judgments" (§ 411, 60 Stat. 844; 28 U.S.C. (1946 ed.) 932).

[14] In *Berkovitz* v. *United States,* No. 87-498 (June 13, 1988), slip op. 7 n.4, this Court described H.R. Rep. 1287 as "[t]he House of

limited nature of the FTCA's waiver of sovereign immunity. It makes clear that the FTCA jurisdictional provision, when unaided by any other statute furnishing federal court jurisdiction over a nongovernment party, is, as *Sherwood* held of the Tucker Act, "narrowly restricted to the adjudication of suits brought against the Government alone" (312 U.S. at 589).

Finally, it is worth noting that nothing in any of the provisions of the FTCA suggests the existence of pendent party jurisdiction. That is significant because those provisions reflect a clear congressional awareness of the most obvious

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Representatives Report on the final version of the FTCA." The Court has frequently relied on H.R. Rep. 1287 in the course of construing the FTCA. *E.g., Berkovitz* v. *United States, supra*; *Kosak* v. *United States*, 465 U.S. 848, 857 (1984); *Muniz*, 374 U.S. at 156-157; see *United States* v. *Shearer*, 473 U.S. 52, 56 (1985) (plurality); *Richards* v. *United States*, 369 U.S. 1, 14 n.29 (1962); *Dalehite* v. *United States*, 346 U.S. 15, 28 n.17 (1953).

In *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 551-552 n.8 (1951), the Court rejected reliance on the above-quoted statements in H.R. Rep. 1287, noting that those statements did not appear in the final Senate Report (S. Rep. 1400, *supra*). But the Court has, as noted, repeatedly relied on H.R. Rep. 1287, and not merely on the Senate Report, as weighty legislative history. Moreover, the *Yellow Cab* Court found the statements unpersuasive authority only for the contention that jurisdiction under the FTCA does not extend to claims for contribution brought against the United States. Not only did that contention run counter to the statutory language, but as the Court itself noted, the statements at issue do not in fact weigh against the bringing of claims against the United States, but only against the joinder of a private co-defendant. See 340 U.S. at 552 n.8 (statements "relate[ ] to the joinder of the United States as a co-defendant, rather than as a third-party defendant"). In the present case, the question of pendent party jurisdiction, unlike the question of contribution discussed in *Yellow Cab*, directly implicates the statement in the committee report that the FTCA "does not permit any person to be joined as a defendant with the United States" (H.R. Rep. 1287, *supra*, at 5).

circumstance in which such jurisdiction might be claimed: when an FTCA plaintiff files a state-law tort claim against the government employee whose act or omission gave rise to the claim. Thus, 28 U.S.C. 2676, which has been part of the FTCA since its enactment in 1946, provides that a judgment "in an action under section 1346(b)" is a complete bar to "any action" against the employee by reason of the same subject matter.[15] Section 2679's provisions concerning automobile accident cases, which were enacted in 1961 (Federal Drivers Act, Pub. L. No. 258, 75 Stat. 539), provide that the FTCA remedy against the United States is exclusive of any action against the federal driver, and expressly recognize that an action against the driver might be brought in state court.[16] Moreover, the 1961 Congress recognized that a person injured by a government employee's conduct could sue the employee " 'instead of or in addition to the United States' " (S. Rep. 736, 87th Cong., 1st Sess. 12 (1961) (quoting letter of Deputy Attorney General)). Although a court of appeals in 1959 had expressly addressed and rejected pendent party jurisdiction over an employee in an FTCA suit (*Falk* v. *United States*, 264 F.2d 238 (6th Cir. 1959)), Congress did not in 1961 provide for or address the subject of pendent party jurisdiction, and it has not done so since.[17]

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[15] The language of Section 2676 would be quite awkward if "action under section 1346(b)" were to encompass claims against the employee, for Section 2676 states that the judgment in such an action is a bar to "any action • • • against the employee."

[16] The exclusivity provisions of Section 2679 were recently extended to all federal employees by the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 5*j* (Nov. 18, 1988).

[17] Section 2675 states that the provision requiring the filing of an administrative claim before an FTCA action is brought against the United States "shall not apply to such claims as may be asserted under

C. Petitioner's Argument Based On Convenience And Judicial Economy Does Not Justify Finding Pendent Party Jurisdiction Under The Federal Tort Claims Act

Despite *Aldinger*'s instruction that the inquiry into pendent party jurisdiction "calls for careful attention to the relevant statutory language" (427 U.S. at 17) and "turns * * * upon the deductions which may be drawn from congressional statutes as to whether Congress wanted to grant this sort of jurisdiction to federal courts" (*id.* at 16-17), petitioner relies neither on the language of the statute nor on its legislative history. Instead, she advances a general policy argument. She observes (Br. 12), as *Aldinger* did (427 U.S. at 18), that there is exclusive federal jurisdiction over FTCA suits under 28 U.S.C. 1346(b).[18] Hence, "*only* in a federal court may all of the [plaintiff's] claims be tried together" (*Aldinger*, 427 U.S.

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the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim." That provision, which was enacted along with the administrative claim requirement in 1966, creates an exception to that requirement where the party claiming against the United States is already in federal court, as it was in *Yellow Cab*. The provision neither itself creates jurisdiction (nor do the Federal Rules, see Fed. R. Civ. P. 82) nor furnishes any evidence that the FTCA jurisdictional provision encompasses claims against defendants other than the United States.

[18] Contrary to the apparent views of the Tenth Circuit (*Stewart* v. *United States*, 716 F.2d 755, 758 (1982), cert. denied, 469 U.S. 1018 (1984)), and the Eleventh Circuit (*Lykins* v. *Pointer Inc.*, 725 F.2d 645, 648 (1984)), the *Aldinger* Court's reference to the FTCA was not an approval of pendent party jurisdiction under that Act. As petitioner herself notes (Br. 11), "[t]he *Aldinger* Court limited its holding to the specific statutes under which the claim was brought." The reference was by its terms merely an illustration that different statutes raise different problems, and it was made in the course of the Court's explanation of why it was expressly declining to rule on any case not squarely before it. See page 14, *supra*.

at 18 (footnote omitted)). Apparently acting on the theory that one suit is better than two, petitioner thus suggests that fairness to her and considerations of judicial economy weigh in favor of recognizing pendent party jurisdiction under the FTCA. See Br. 10, 33.[19]

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[19] Actually, much of petitioner's brief (Br. 12-26) is devoted to cataloguing cases that purportedly bear on the question of pendent party jurisdiction under the FTCA. It is certainly true, as we noted in our response to the certiorari petition in this case (at 6), that, unlike the Ninth Circuit, both the Tenth Circuit (*Stewart* v. *United States*, 716 F.2d at 757-759) and the Eleventh Circuit (*Lykins* v. *Pointer Inc.*, 725 F.2d at 647-649; see *Brown* v. *United States*, 838 F.2d 1157, 1159 n.5 (11th Cir. 1988)) have squarely held that pendent party jurisdiction is permissible in FTCA actions in light of *Aldinger*. But, even aside from the inadequate analysis undertaken in the decisions she cites, petitioner's catalogue does not establish nearly as much support for her view as she contends. Cf. *Citizens Marine National Bank* v. *United States Dep't of Commerce*, 854 F.2d 223, 226 (7th Cir. 1988) (describing pendent party jurisdiction concept in general as "embattled"), petition for cert. filed, No. 88-940 (Dec. 7, 1988).

First, petitioner fails to cite decisions of the Sixth Circuit and the Eighth Circuit that reject the theory of pendent party jurisdiction in FTCA cases. *Kack* v. *United States*, 570 F.2d 754, 757 n.4 (8th Cir. 1978); *Falk* v. *United States*, 264 F.2d 238, 239 (6th Cir. 1959). Moreover, putting aside those decisions that did not rule on the FTCA issue or did so only as an alternative ground (*e.g.*, *Wood* v. *Standard Products Co.*, 456 F. Supp. 1098 (E.D. Va. 1978); *Dick Meyers Towing Service, Inc.* v. *United States*, 577 F.2d 1023 (5th Cir. 1978), cert. denied, 440 U.S. 908 (1979)), many of the decisions she cites involved claims against parties that were already properly in the federal case, typically because they had been impleaded by the United States, as in *Ortiz* v. *United States Gov't*, 595 F.2d 65 (1st Cir. 1979), or were cases in which the United States, by filing a cross-claim against a co-party, demonstrated that it would have impleaded that party. See *Hipp* v. *United States*, 313 F. Supp. 1152 (E.D.N.Y. 1970) (cross-claim); *Maltais* v. *United States*, 439 F. Supp. 540 (N.D.N.Y. 1977) (cross-

To be sure, practical considerations may properly be taken into account in construing jurisdictional statutes, and petitioner's policy argument would presumably have a strong bearing on the application of a jurisdiction-granting statute that made no reference to the range of parties that may be brought into federal court. But the FTCA is not such a statute: it identifies a single party defendant in its jurisdictional provision. And for all of the reasons we have set forth, that provision is properly construed to establish jurisdiction over no other defendant. Where the case for construing a statute to set certain limits is as strong as it is here, a pure policy argument such as petitioner's cannot justify expanding jurisdiction beyond those limits. See *Kroger,* 437 U.S. at 377 (rejecting argument based on "the convenience of litigants [and] considerations of judicial economy," and holding that court has no jurisdiction over claim by plaintiff in diversity action against impleaded third-party defendant where there is no independent basis of federal jurisdiction over that claim); *Aldinger* v. *Howard, supra.*

In any event, petitioner's policy arguments are far weaker than she suggests. An assessment of possible gains in efficiency from allowing pendent party jurisdiction, and the relevance of any gains to determining whether such jurisdiction is permissible notwithstanding the express language of 28 U.S.C. 1346(b), must be far less simplistic than petitioner's one-suit-rather-than-two analysis. Such an assessment shows that petitioner's argument for judicial economy could not weigh heavily even if it were considered in the statutory analysis.

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claim); *Dumansky* v. *United States,* 486 F. Supp. 1078 (D.N.J. 1980) (cross-claim); *Florida East Coast Ry.* v. *United States,* 519 F.2d 1184, 1193-1196 (5th Cir. 1975) (impleader).

It is critical, first, to take account of the numerous special rules that Congress has established for FTCA litigation. For example, an FTCA claim against the government must be tried without a jury (28 U.S.C. 2402), whereas any pendent state-law claims would generally be subject to trial by jury under the Seventh Amendment (see *Yellow Cab,* 340 U.S. at 555). The resulting duplication of functions between judge and jury can give rise to a number of practical problems (see *id.* at 555-556), not the least of which is the possibility of inconsistent determinations by the different factfinders. Cf. *Barron* v. *United States,* 654 F.2d 644, 649-650 (9th Cir. 1981) (private co-defendant in FTCA action is not bound by judge's determination of government's proportionate share of liability). Petitioner here has requested a jury trial (J.A. 72). "Thus, the trial of this action would be partly to the Court and partly to the jury with all of the problems associated with such an arrangement." *Center Glass & Trim Co.* v. *United States,* 637 F. Supp. 209, 212 (S.D. W. Va. 1986) (rejecting pendent party jurisdiction under 42 U.S.C. 4072).

Special standards govern the liability of the United States. The government can be held liable under the FTCA only for negligent or wrongful conduct, not on a strict-liability theory. 28 U.S.C. 1346(b), 2680(a); *Laird* v. *Nelms,* 406 U.S. 797 (1972). It cannot be liable for punitive damages. 28 U.S.C. 2674; *Carlson* v. *Green,* 446 U.S. 14, 22 (1980). Thus, while petitioner here alleges merely negligent conduct with respect to her claim against the United States (J.A. 60-63), she seeks punitive damages against one of the "pendent" defendants, the Utility, alleging that the Utility engaged in "oppression, fraud and malice" warranting punitive damages under state law (J.A. 68-69). Similarly, the government may claim any of numerous defenses, exemptions, and immunities, including those for discretionary functions (28 U.S.C.

2680(h)), and activities incident to military service (*United States* v. *Johnson,* 481 U.S. 681 (1987); *Feres* v. *United States,* 340 U.S. 135 (1950)). In addition, a claimant against the government under the FTCA must file an administrative claim within two years of accrual, cannot file suit more than six months after the claim has been denied or not acted on (28 U.S.C. 2401(b), 2675(a)), and is presumptively limited in damages to the amount requested in the administrative claim (28 U.S.C. 2675(b)).

This panoply of special rules is significant, first, because the rules evince a deliberate effort by Congress carefully to circumscribe the nature and extent of FTCA litigation. That congressional approach underscores the importance of respecting the single-party limit on the jurisdictional grant of 28 U.S.C. 1346(b). The rules are also significant because they make clear that recognizing pendent party jurisdiction over nongovernment tortfeasors would not in fact produce much of the efficiency that petitioner alleges. Thus, the government would be able to resolve claims on the pleadings in many cases in which nongovernment defendants would have to proceed to trial. Both in discovery and at trial, different issues would often be presented against different defendants. And different fact finders (judge and jury) frequently would have to try the issues.[20] The greater such difficulties, the more the efficiency gains

[20] In *Moor,* 411 U.S. at 715-717, this Court upheld a district court's decision not to exercise pendent party jurisdiction in a particular case based in part on the fact that different rules would apply to the principal defendant and the "pendent" defendant. As the case at bar suggests, in FTCA suits there are virtually always such differences. Cf. *Lynn* v. *United States,* 110 F.2d 586, 589 (5th Cir. 1940) (cited in H.R. Rep. 1287, *supra,* at 5) ("The proceeding is sui generis. * * * It is not to be embarrassed by joining other litigants who may be entitled to jury trial, and whose liability must necessarily depend on different principles.").

touted by petitioner would evaporate—and the more the federal proceeding would be beset by problems of coordination and delay that may be as great as those which must be solved if there are separate state and federal proceedings.

Those practice problems are not, to be sure, insurmountable, though if pendent party jurisdiction were discretionary, as pendent claim jurisdiction is, they might well warrant a refusal to accept the jurisdiction in many cases. An express grant of jurisdiction, as in *Yellow Cab,* may make it necessary to tolerate such difficulties, but no such necessity is present here. And whatever efficiency gains might exist in some instances, there are strong reasons to think that the practical problems are serious enough to undermine petitioner's efficiency argument in a broad class of FTCA cases. In those circumstances, petitioner's argument can have little force in the statutory analysis; it certainly cannot overcome the strong considerations favoring the construction of the FTCA that precludes pendent party jurisdiction.[21]

[21] Contrary to the suggestion of petitioner (Br. 15-16, citing *Hipp,* 313 F. Supp. at 1155), it is not necessary to recognize pendent party jurisdiction in order for the government to be able to secure contribution from joint tortfeasors. The United States may, of course, implead a private person as a third-party defendant, because there is an independent basis of jurisdiction under 28 U.S.C. 1345. The plaintiff then may be able to add a claim against the third-party defendant, as we argued in our brief in *Ayala* (at 24-28). But even if he cannot do so as a result of the ruling in *Owen Equipment & Erection Co.* v. *Kroger, supra* (rendered after we filed our *Ayala* brief), the *Hipp* court's concern—that contribution was available only if the tortfeasors were parties to a single judgment—is of little if any practical significance. New York long ago abandoned that rule (see N.Y. Civ. Prac. L. & R. 1401 (McKinney 1976)), and the Uniform Contribution Among Tortfeasors Act (§ 1) expressly rejects any such limitation (12 U.L.A. 63 (1975)).

Surely, there is no compelling reason on judicial-efficiency grounds to assume, as petitioner does, that Congress "wanted" (*Aldinger*, 427 U.S. at 17) to allow the exercise of pendent party jurisdiction in FTCA cases. Such an assumption is especially unwarranted in light of the fact that even if pendent party jurisdiction under the FTCA were to produce some gains in efficiency, only state courts would benefit. The alleged gains would derive from a one-way shifting of state-court suits into federal court.

Indeed, recognizing pendent party jurisdiction under the FTCA would undoubtedly encourage some plaintiffs to file FTCA actions against the government that would not otherwise be filed, for the sole purpose of obtaining a federal forum for their ordinary state-law tort claims against others. Cf. *Grinter* v. *Petroleum Operation Support Service, Inc.*, 846 F.2d 1006 (5th Cir. 1988) (state-law claim against "pendent" defendant anchored on jurisdictionally defective FTCA claim), cert. denied, No. 88-691 (Nov. 28, 1988); *Kroger*, 437 U.S. at 374 & n.17. Because of the wide array of activities in which the government is involved and the difficulty of identifying such improperly filed cases early in the litigation, the additional burden on the government and the federal courts might be substantial.

* * * * *

"It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Kroger*, 437 U.S. at 374. Petitioner's state-law claims against the City and the Utility, both parties not otherwise properly in federal court, are outside the limits of the FTCA's grant of jurisdiction.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 87-1973

In The

Supreme Court of the United States

October Term, 1988

BARBARA FINLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether it is error for the Circuit Court of Appeals to reverse and dismiss pendent-parties for lack of jurisdiction, in a case which includes exclusive federal jurisdiction over the United States of America as defendant, after a District Court has exercised discretion and invoked pendent-party jurisdiction over parties not subject to independent federal jurisdiction.

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

FEDERAL DISTRICT COURTS MAY EXERCISE PENDENT-PARTY JURISDICTION IN ACTIONS AGAINST THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT.

Respondent's argument raises but three issues. For organizational continuity each issue will be addressed by petitioner in the order presented in respondent's brief.

A. PENDENT-PARTY JURISDICTION IS PERMISSIBLE PROVIDED CONGRESS HAS NOT EXPRESSLY OR BY IMPLICATION NEGATED ITS EXISTENCE.

Respondent first argues that the controlling authority of *Aldinger v. Howard*, 427 U.S. 1 (1976), *rev'd on other grounds, Monell v. New York Department of Social Services*, 436 U.S. 658 (1978) prohibits a district court from exercising pendent-party jurisdiction if the language of the statute which confers jurisdiction "expressly or by implication negate[s] its existence." Respondent's Brief (R.B.) at 15.

Petitioner concurs with respondent and contends that the primary issue before this Court is whether the language of 28 U.S.C. section 1346(b), conferring jurisdiction over "civil actions on claims against the United States," expressly or by implication negates the existence of pendent-party jurisdiction, or whether "Congress left it open for the federal courts to fashion a jurisdictional doctrine under the general language of Art. III. . . ." *Aldinger*, 427 U.S. at 16.

B. THE LANGUAGE, PURPOSE, AND LEGISLATIVE HISTORY OF THE FEDERAL TORT CLAIMS ACT DOES NOT NEGATE THE EXISTENCE OF PENDENT-PARTY JURISDICTION.

The parties agree that the principal issue before this Court is whether the language of the Federal Tort Claims Act (FTCA) expressly or by implication negates the existence of pendent-party jurisdiction. However, contrary to the claim of the United States, the only reasonable and fair interpretation of the: (1) language (2) purpose, and

(3) legislative history of the FTCA, is that it clearly supports the existence of pendent-party jurisdiction.

1. The language of the Federal Tort claims Act, does not negate the existence of pendent-party jurisdiction.

Respondent's contention, that the "most natural reading" of 28 U.S.C. section 1346(b), is that it extends jurisdiction "only to the adjudication of claims against the United States," is without merit. (R.B. at 17). The broad and general language of the statute contains no restrictive or limiting words whatsoever, and is more in line with the sweeping, and all emcompassing language of *Federal Rules of Civil Procedure*, Rule 2, which declares "[t]here shall be one form of action to be known as 'civil action'."

Respondent correctly states that under the *Aldinger* test a court must determine whether "Congress has addressed itself to the *party* as to whom jurisdiction pendent to the principal claim is sought." *Aldinger*, 427 U.S. at 16, (emphasis in original). However, respondent's assertion that in the case at bar, "as in *Aldinger*, the provision granting jurisdiction over the principal defendant is limited to a class of persons that excludes the pendent parties" (R.B. at 16) is fatally flawed.

Primarily, respondent incorrectly reads the holding in *Aldinger* as stating that the language of 28 U.S.C. section 1334 of "persons" impliedly negates the existence of pendent-party jurisdiction in civil rights actions. A close reading of *Aldinger* shows that the Court did not

undertake a statutory analysis to determine whether Congress intended to allow pendent-party jurisdiction in civil rights actions; rather, the Court relied on its own precedent which stated that it was the intent of Congress that *counties* could not maintain *a cause of action* under 41 U.S.C. action 1983, under any jurisdictional basis, to wit:

> Yet petitioner does not, and indeed could not, contest the fact that as to §1983, counties are excluded from the 'person[s]' answerable to the plaintiff 'in an action at law [or] in equity'

Aldinger, 427 U.S. at 16, citing *Monroe v. Pape*, 365 U.S. 167, 187-191 (1961); and *City of Kanosha v. Bruno*, 412 U.S. 507, 511-513 (1973).

Subsequently, *Monroe* and *Kanosha, supra*, were expressly overruled in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), which held:

> Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom §1983 apply. (emphasis in original).

Monell, 436 U.S. at 690.

As such, we can conclude that if *Aldinger* were heard today, a different result might be reached, notwithstanding the fact that the language of "persons" remains unchanged. Respondent's conclusion that simply because the language of a jurisdiction conferring statute refers to a particular class of persons, it is intended to exclude all others, is without foundation. The *Aldinger* decision clearly teaches that pendent-party jurisdiction must be viewed in the context of the entire *cause of action*:

> In short, as against a plaintiff's claim of *additional* power over a 'pendent party,' the reach of the statute conferring jurisdiction should be construed in light of the scope of the cause of action as to which federal judicial power *has* been extended by Congress. (emphasis in original).

Aldinger, 427 U.S. at 17.

The scope of the cause of action under the FTCA is tort claims, and in broad language the liability section of the Act states:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . .

28 U.S.C. section 2674.

The emphasis in the FTCA is that the government shall be liable under the same circumstances as a private person under the law of the location where the act or omission occurred. Similar language is also found in 28 U.S.C. section 1346(b), and in the administrative claim section, 28 U.S.C. section 2672. No language exists anywhere in the FTCA which limits or precludes the United States from being held jointly liable with a joint or co-tortfeasor. To the contrary, the thrust of the FTCA clearly suggests that if a private individual in a local jurisdiction may be held jointly liable with a joint or co-tortfeasor, then the United States must also be so held.

In *Aldinger*, the Court was bound by precedent that counties were excluded from a cause of action under 41 U.S.C. section 1983, and as such, a county could not be included in a case under pendent-party jurisdiction where no jurisdiction previously existed. Under the

FTCA, there is no such precedent or negating language to preclude the government from being held jointly liable with a joint or co-tortfeasor. As such, when "construed in light of the scope of the cause of action as to which federal judicial power *has* been extended by Congress" (*Aldinger*, 427 U.S. at 17), it is clear that the FTCA does not contain language which expressly or impliedly negates the existence of pendent-party jurisdiction over joint or co-tortfeasors.

Respondent's argument that this Court should avoid an interpretation of 28 U.S.C. section 1346(b) which acknowledges the existence of pendent-party jurisdiction, as it would raise serious constitutional questions, is illusory. Respondent concedes that "[it] may well be, as we suggested in our brief in *Ayala* (at 10-11), that pendent party jurisdiction would be constitutionally proper if congress provided for it." R.B. at 16. Moreover, respondent offers no argument or authority that such an interpretation would be unconstitutional.

The broad language of Article III, section 2, clause 1 states judicial power shall extend to "[c]ontroversies to which the United States shall be a party," has previously been interpreted by Congress as conferring upon it the authority to grant federal jurisdiction over private parties in controversies to which the United States is a party. For example, 28 U.S.C. section 2409 provides:

> Any civil action by any tenant in common or joint tenant owning an undivided interest in lands, where the United States is one of such tenants in common or joint tenants, against the United States alone or against the United States *and any other of such owners*,

> shall proceed, and be determined, in the same manner as would a similar action between private persons. (emphasis added)

The statute's language is remarkably similar to the FTCA. Any civil action against a party jointly interested with the United States, shall be determined in the same manner as an action between private persons under the laws of the local jurisdiction. This statute, which confers federal jurisdiction over a private party in a controversy to which the United States is a defendant, was enacted in 1948 and has not suffered any constitutional challenges. Thus, it would seem clear that Congress and the courts do, in fact, possess discretion to fashion jurisdictional rules under the broad contours of Article III.

2. The purpose of the FTCA is not only to waive sovereign immunity but also to form a workable and equitable system for the application of local law.

Respondent's proposition that the FTCA is simply a limited waiver of sovereign immunity which must be construed strictly in favor of the sovereign falls short of a complete analysis. Petitioner is not attempting to enlarge the liability of, or encroach upon the sovereign immunity of, the United States. Rather, petitioner seeks a more equitable application of the Act with no increase in liability to the sovereign. It has long been established that the FTCA is not to be construed as an isolated or exclusive act, but should be construed to form a workable and equitable systems of laws:

> This act, however, should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the government

> to make a work a workable, consistent and equitable whole. The Tort Claims Act was not an isolated and spontaneous flash of congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit.

Feres v. United States, 340 U.S. 135, 139 (1950).

Therefore, when construing the FTCA as a part of the entire equitable statutory system of remedies against the government, it cannot be said that the Act is simply a limited waiver of sovereign immunity. The plain language of the Act shows it is also intended to hold the government liable as a private person in accordance with the law of the place where the act or omission occurred. 28 U.S.C. sections 1346(b), 2672 and 2674.

With respect to the contention that the FTCA merely substitutes the district court for Congress, respondent again presents an overly simplified approach. It is axiomatic that the Act removed the administration of tort claims from the legislative branch to a judicial forum wherein the federal rules of civil procedure apply. It is, however, significant that jurisdiction was given to the district courts as opposed to the Claims Court, as the "court of claims is a legislative, not a constitutional court." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Therefore, it is clear that the purpose of the FTCA was not only to provide a waiver of sovereign immunity, but also to create a workable and equitable system of laws and a judicial forum wherein the government may be held liable as a private person under the local laws of the forum.

3. The legislative history of the FTCA establishes the liability of the United States along with joint and co-tortfeasors in accordance with local law.

The legislative history of the FTCA does not negate the existence of pendent-party jurisdiction. Rather, it shows that Congress intentionally left the way open for courts to fashion equitable rules for the application of state law.

Respondent offers excerpts from two House Committee Reports on bills similar to the one which eventually became the FTCA. Respondent contends that these reports show a Congressional intent to limit the district court's jurisdiction under the FTCA to the extent exercised by the Court of Claims or the district courts under the Tucker Act. Respondent draws an analogy between the jurisdiction of the district courts under the Tucker Act and the jurisdiction of the district courts under the FTCA. However, the patent dissimilarities of the two show a clear Congressional intent to establish two distinct areas of jurisdiction.

The most striking distinction between the two areas of jurisdiction is that under the Tucker Act district courts exercise jurisdiction concurrent witht the Court of Claims, whereas under the FTCA the jurisdiction of the district courts is exclusive. In addition, the jurisdiction of a district court under the Tucker Act is limited to $10,000.00, whereas under the FTCA, jurisdiction is not limited to a specific dollar amount. In short, had Congress intended to limit the district court's jurisdiction under the FTCA it could have easily included such language in the Act itself as Congress had done previously.

Moreover, respondent's interpretation of House Report No. 2245 is internally inconsistent. Respondent argues that defendants may not be joined with the United States at any time, whereas, consistent with the clear language of the FTCA, the report states that the rights and liabilities of the United States involving joint tortfeasors, shall be left to local law:

> Section 403 of the Senate Bill provided for proportionate liability of the United States where a Government employee was a joint tortfeasor with someone else. This provision is not contained in the recommended bill and in cases involving joint tortfeasors the rights and liabilities of the United States will be determined by the local law.

H.R. Rep. 2245, 77th Cong. 2d Sess. 9 (1942).

Under Respondent's interpretation, if local law required joint tortfeasors to be named in a single action, the conflicts in the above passage would be irreconcilable. A far more reasonable construction is that Congress did not wish to create rights of indemnity and contribution among joint tortfeasors where none existed under state law. Instead Congress simply left the issue to local jurisdictions.

The jurisdictional language of the proposed bills and of the original FTCA was that the district court shall have jurisdiction to "render judgment on any claim against the United States." This language is identical to the jurisdictional language of the Court of Claims which states the Court shall have "jurisdiction to render judgment on any claim against the United States. . . ." 28 U.S.C. section 1491.

In 1948 the language of 28 U.S.C. section 1346(b) was broadened from the previously discussed limiting language to the more general language of "jurisdiction of civil actions on claims against the United States. . . ." Respondent attempts to minimize the effects of this distinction, but a presumption is raised that a change in wording intended a change of meaning.

The only clear and consistent Congressional intent which can be extracted from the long legislative history of the FTCA is that Congress intended all aspects of liability to be determined by local law, and specifically those aspects of liability concerning indemnity, contribution, and joint tortfeasors.

C. CONVENIENCE, JUDICIAL ECONOMY, AND FAIRNESS COUPLED WITH EXCLUSIVE JURISDICTION, JUSTIFY ALLOWING DISCRETION IN THE EXERCISE OF PENDENT-PARTY JURISDICTION UNDER THE FEDERAL TORT CLAIMS ACT.

Respondent incorrectly contends that petitioner's argument is solely based upon a general policy argument that "one suit is better than two" (R.B. at 27). Petitioner's argument is based in substantial part on the same convenience, fairness and judicial economy of the "one suit verses two suit" policy which weighed heavily in the landmark pendent claims decision of *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). However, petitioner's argument is further supported, as the *Aldinger* Court stated, by the fact that under the FTCA, a federal court is the *only* forum wherein petitioner may try all her claims together:

> When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S. §1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only* in a federal court may all of the claims be tried together. (emphasis in original)

Aldinger, 427 U.S. at 18.

Moreover, respondent's argument that conferring pendent-party jurisdiction will not produce the judicial economy expected, or that it will only benefit the state courts, flies in the face of the facts in the case at bar. Both parties which were added to this suit as pendent parties have filed indemnity actions against the United States in the only forum available: the federal court.[1] Thus, petitioner's judicial economy argument would be more accurately described as a policy of "one case is better than four."

Respondent next contends that several special rules of the FTCA which concern juries, strict liability, punitive damages, discretionary immunity, and administration of claims, show an intent of Congress to limit the scope of the Act. This Court has previously addressed and dismissed just such an interpretation. In *United States v. Yellow Cab Company*, 340 U.S. 543 (1951) the government was attempting to shield itself from a third-party complaint for contribution by raising the procedural argument that the FTCA does not permit a jury trial. In broad and unequivocal language the Court held:

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[1] *City of San Diego v. United States*, Civil No. 87-187-S (SD CA) and *San Diego Gas & Electric v. United States*, Civil No. 86-2017-S (SD CA).

> Such difficulties are not insurmountable. If, for example, a jury had been demanded the decision of jury and nonjury issues could have been handled in a manner comparable to that used when issues of law are tried to a jury and issues of an equitable nature in the same case are tried by the court alone. . . . The availability of third-party procedure is intended to facilitate, not to preclude, the trial of multiple claims which otherwise would be triable only in separate proceedings. The possibility of such procedural difficulties is not sufficient ground for so limiting the scope of the Act as to preclude its application to all cases of contribution or even to all cases of contribution arising under third-party practice.

Id. at 555-556.

Respondent, however, concedes that procedural problems are not insurmountable and states that any problems could be controlled if pendent-party jurisdiction was upheld as a matter of discretion only. (R.B. at 31). Petitioner strongly concurs.

This Court's recent decision of *Carnegie-Mellon University v. Cohill*, No. 86-1021 (Jan. 20, 1988), restates the long standing rule of *Gibbs* that pendent jurisdiction is a matter of discretion:

> For this reason, *Gibbs* emphasized that 'pendent jurisdiction is a doctrine of discretion, not of plaintiff's right.' *Ibid.* Under *Gibbs*, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims.

Carnegie-Mellon, No. 86-1021 (Jan. 20, 1988)

Petitioner urges that the same discretionary doctrine be applied to questions of pendent-party jurisdiction when as in the FTCA, a claimant is required to proceed exclusively in federal court.

CONCLUSION

For the reasons set forth above, petitioner again respectfully requests that the Order of the United States Court of Appeals for the Ninth Circuit be reversed and the Order of the District Court be reinstated.

Futher, petitioner again requests this Court affirm the discretionary use of pendent jurisdiction over non-federal defendants in cases where plaintiffs are required to proceed against a joint tortfeasor exclusively in federal court.

Respectfully submitted,

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